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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1981

BILL M. SILKWOOD, Administrator of the Estate of KAREN G. SILKWOOD, Deceased,
Appellant,

VERSUS

THE KERR-McGEE CORPORATION,
a Delaware Corporation, and
THE KERR-McGEE NUCLEAR CORPORATION,
a Delaware Corporation,
Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

JURISDICTIONAL STATEMENT

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May, 1982

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QUESTIONS PRESENTED

1. Did the court below misapply *Northern States Power Co.* v. *Minnesota** and err in finding a general state punitive damages statute to be federally preempted as repugnant to the Atomic Energy Act.

2. Does nullification of a jury's $10 million punitive damage verdict on preemption grounds represent a denial of due process and of equal protection of the laws, unsanctioned by *Duke Power Co.* v. *Carolina Environmental Study Group.***

PARTIES BELOW

The only parties to this proceeding in the court below are those indicated by the caption of this jurisdictional statement.

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*447 F.2d 1143 (8th Cir. 1971), *aff'd mem.* 405 U.S. 1035 (1972).

**438 U.S. 59 (1978).

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Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

JURISDICTIONAL STATEMENT

Bill M. Silkwood, Administrator of the Estate of Karen G. Silkwood, Deceased, files this Statement to establish that the Court has jurisdiction to review the opinion and orders entered by the United States Court of Appeals for the Tenth Circuit and should exercise its jurisdiction in this case.

OPINIONS BELOW

The opinion of the Honorable Frank G. Theis overruling Appellee's Alternative Motion for Judgment n.o.v. or New Trial appears at 485 F.Supp. 566 *et seq.* and is included in the Appendix, pp. 42a-126a. The opinion of the

United States Court of Appeals for the Tenth Circuit reversing in part, the District Court appears at 667 F.2d 908, *et seq.* It includes a detailed dissent by Judge Doyle, 667 F.2d, at 923-930, and is included in the Appendix, pp. 1a-40a. The court's order denying Appellant's Petition for Rehearing is included in the Appendix, p. 41a.

GROUNDS FOR JURISDICTION

This appeal arises from an opinion and order of the United States Court of Appeals for the Tenth Circuit, which determined Oklahoma's punitive damage statute,[1] as applied to a federally licensed nuclear facility to be invalid as repugnant to Article VI of the United States Constitution and to the Atomic Energy Act, 42 U.S.C. § 2011, *et seq.*

The order denying Appellant's Petition for Rehearing and Suggestion for Rehearing In Banc was entered by the Court of Appeals on February 19, 1982. A timely Notice of Appeal was filed on May 10, 1982.

This appeal is within this Court's appellate jurisdiction pursuant to 28 U.S.C. § 1254(2). A Court of Appeals decision holding a state statute invalid by preemption under the Supremacy Clause, Article VI of the U.S. Constitution, falls within the Court's mandatory appellate jurisdiction under § 1254(2). *Tully* v. *Mobil Oil Corp.*, ___ U.S. ___, 102 S.Ct. 1047, 1049n.1 (1982); *Malone* v. *White Motor Corp.*, 435 U.S. 497, 499 (1978); *Alessi* v. *Raybestos-Manhattan,*

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[1]Under Oklahoma law, punitive damages are statutory, 23 O.S. §9. *Phillips Machinery Co.* v. *LeBland, Inc.*, 494 F.Supp. 318 (N.D. Okl. 1980).

Inc., 451 U.S. 504, 506 (1982); *Edgar* v. *Mite Corp.*, No. 80-1188, *probable jurisdiction noted*, 101 S.Ct. 2043 (1981); *Kramarsky* v. *Delta Air Lines*, No. 81-1578, *probable jurisdiction noted*, 50 U.S.L.W. 3838 (April 20, 1982).

Invalidation of a state staute as applied also comes under § 1254(2) mandatory appellate jurisdiction. See *Malone* v. *White Motors Corp.*, *supra*, *Dutton* v. *Evans*, 400 U.S. 74, 76 n.6 (1970); *Detroit* v. *Murray Corp. of America*, 355 U.S. 489, 491-92 (1958).

The decision also raises serious federal constitutional due process and equal protection questions. These issues are unavoidably presented by the appellate court's negation of the state statute and are subject to this Court's appellate review under § 1254(2).[2]

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[2]Even if the federal constitutional questions presented were viewed as separate from the Court's state law invalidation determination, they still should fall within the Court's §1254(2) appellate jurisdiction. See HART & WECHSLER, *The Federal Courts and the Federal System*, 1373 (2d Ed. 1973); WRIGHT, MILLER & COOPER, *Federal Practice and Procedure, Jurisdiction*, §4037 (1978). *But see*, 12 MOORE, FEDERAL PRACTICE, ¶435.012[2].

Under the analogous 28 U.S.C. §1257, the cases make clear that consideration of additional questions is appropriate. See *Energy Resources Group* v. *Kansas Power & Light Co.*, *probable jurisdiction noted*, 50 U.S.L.W. 3783 (March 30, 1982), see jurisdictional statement at 2, n.2; *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 487 n.14 (1975); *Flournoy* v. *Wiener*, 321 U.S. 253, 263 (1944); *Prudential Insurance Co.* v. *Cheek*, 259 U.S. 530, 567 (1922).

If the Court were to conclude that one of the questions presented would not qualify for appellate review under §1254(2), it should be treated as a petition for certiorari on that question in accordance with 28 U.S.C. §2103.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes involved are set forth in the Appendix accompanying this statement: the Supremacy Clause, Article VI, Clause 2, of the United States Constitution; the Fifth Amendment to the United States Constitution; 28 U.S.C. § 1254(2), 28 U.S.C. § 1257, 28 U.S.C. § 2103; relevant parts of the Atomic Energy Act, 42 U.S.C. § 2011, *et seq.*; the Oklahoma punitive damage statute, 23 O.S. § 9.

STATEMENT OF THE CASE

A. Trial Court Proceedings

Appellant filed his diversity action in the United States District Court for the Western District of Oklahoma alleging that his deceased daughter, Karen G. Silkwood, suffered serious physical injury and emotional distress when she was contaminated with plutonium from the nuclear fuel fabrication plant operated by the Appellees at which she we employed. Predicating liability upon negligence and strict liability, Appellant also sought punitive damages. Appellant's claim was for $1,505,000 actual damages and $10,000,000 punitive damages.

After extensive pre-trial pleading and discovery, trial commenced on March 6, 1979. During an eleven-week trial over 40 witnesses testified and 200 exhibits were admitted. Appellees' motion to dismiss was overruled, as was a motion for directed verdict. The jury was instructed and given five special interrogatories to answer. After deliberating twenty-six hours over a three-day period, the jury returned

a verdict in the amount of $505,000 actual and $10,000,000 punitive damages. Appellees' Motion for Judgment n.o.v. and New Trial was overruled. (Appendix, pp. 42a-126a.

B. Appllate Proceedings

At the Tenth Circuit, Appellees challenged the ruling of the trial court rejecting its post-trial motions on numerous grounds. The focus of Appellees' attack was first, that the injuries upon which $500,000 of the actual damages was awarded were subject to the exclusive jurisdiction of the Oklahoma Workers' Compensation Act[3] and, second, that the award of damages, either actual or punitives, was preempted where "substantial compliance" with the Nuclear Regulatory Commission regulations and license conditions was demonstrated. Amicus Atomic Energy Forum, a nuclear trade association, additionally argued that strict liability was inappropriate for this case.

In a 2-1 decision, the Court of Appeals affirmed the imposition of strict liability for appellees' ultrahazardous activities and upheld the jury's award of $5,000 for property damage, but reversed the trial judge's decision on the personal injury[4] and punitive damages. As to punitive damages, the majority held that *Northern States* required

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[3]Of the total award, $5,000.00 was the stipulated value of the personal belongings of Karen Silkwood which were confiscated as a result of the contamination of her apartment.

[4]The trial judge declined to allow the presumption of coverage which benefits a claimant in an Industrial Court proceeding to be invoked by an employer-defendant in a civil case. The Court of Appeals reversed, invoked the presumption to shift the burden to Appellant, and found that he failed to rebut the prima facie case so established.

the Court to "hold invalid any state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material." Punitive damages were barred *per se* "whether Kerr-McGee violated AEC regulations in the conduct of its plant operations" or not (Appendix, p. 24a).

The Court remanded the case to the district court "for further considerations consistent herewith"[5], and denied Appellant's Petition for Rehearing.

C. Basic Facts

Appellees operated a plant some 30 miles north of Oklahoma City, Oklahoma, which produced plutonium-based fuel rods for an experimental breeder reactor.[6] Karen Silkwood was employed as a laboratory analyst at this facility from August, 1972, until her death on November 13, 1974.

Appropriately named after the Roman god of the infernal regions, plutonium is a man-made, highly radioactive

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[5]In light of this remand (see *Gough* v. *Rossmoor Corporation*, 533 F.2d 453 (9th Cir. 1976)) and the nature of the issues raised by Appellant in his Petition for Rehearing, the trial judge may later determine Appellant's entitlement to a new trial so that Appellant would have the opportunity to remedy the defect in his case which was first discovered by the Court of Appeals. *See Neely* v. *Martin K. Eby Construction*, 386 U.S. 317 (1967); *Iacurci* v. *Lummus Company*, 387 U.S. 86 (1967); *United States* v. *Generes*, 405 U.S. 93, 112-113 (White, Concurring) (1972), cf. *Brunswick Corporation* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489-490 (1977).

[6]Citations to the record have been omitted. All facts recited in this Statement were fully referenced in Appellant's voluminous brief filed with the Court of Appeals.

element used in thermo-nuclear weapons and experimental fuels. Extremely persistent[7], it is explosive, flammable, and possibly the most toxic substance known to man. Even in submicroscopic quantities[8], it is extremely dangerous especially if inhaled[9] where it emits thousands of radioactive particles[10] per minute inflicting serious and irreversible damage to the cells and tissues.[11]

Appellees acknowledged that because of these hazards, the plutonium they possessed had to be absolutely contained.

D. Federal Licensing and Regulations

Appellees' facility was licensed and periodically inspected[12] by the Atomic Energy Commission (later, the Nuclear Regulatory Commission, NRC). The NRC's re-

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[7]The "half-life" of the isotope Pu239 is 24,000 years.

[8]A speck of plutonium the size of a pollen gran is a sufficient quantity to guarantee lung cancer.

[9]Once inhaled, its "biological half-life" is 200 years. There is no known method to safely remove plutonium from the lungs.

[10]Giants in this subatomic world, alpha particles deliver enormous energy to the cell (2.5 million times the equivalent amount of carbon), and disrupt the genetic information in the cells ("tearing pages out of the books in a library",) making them cancerous. That alpha particles produce cancer has long been recognized.

[11]The amount of plutonium conceeded to be present in Karen Silkwood's lungs at the time of her death emitted 10,000 alpha particles each minute.

[12]Although some inspections were to be unannounced, employees testified that they were always alerted to inspections and cleaned up the plant in anticipation.

gional director testified that since Appellees' facility utilized a unique production process, it presented the AEC licensing division with major uncertainties. As a result, the license was not designed to cover all contingencies.[13] These regulatory standards reflected only the minimum care that should be given; compliance was no guarantee of safety; the licensee was expected to do more than was minimally required if demanded by reasonable prudence.

AEC inspectors cited Appellees for over 75 violations of specific regulatory requirements and expressed harsh criticism of the operation of the facility.[14] However, AEC never imposed a fine or other punishment.

E. Contamination of Karer Silkwood

In separate incidents on November 5th, 6th, and 7th, 1974, Karen Silkwood was contaminated with plutonium from Appellees' facility. On November 7th, she was found to be highly contaminated and traces of plutonium were

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[13]In one instance, two workers who had eaten at a local restaurant were found to be contaminated when they returned to the plant. Neither the AEC nor the restaurant was notified. The license and regulations did not specifically require such a notification. The AEC became aware of this incident 18 months after it happened through a tip from a concerned citizen who had learned of it from workers at the plant.

[14]Regional Director James Keppler testified that there was no evidence that Kerr-McGee management was on top of the situation, that Kerr-McGee was not committed to the "as low as practical" standard, had failed to replace professional health physicists lost years before, that contamination incidents seemed to get short shrift, equipment at the plant was archiac and prone to break down and the large number of procedural errors was attributable to inadequate training, personnel turnover, or lack of supervision.

discovered throughout her apartment[15] with the highest levels found on a package of food in her refrigerator. Distraught upon learning she was seriously contaminated, she expressed her belief that the dose she had suffered was lethal and that nothing could be done to help her; she feared that she would be unable to bear normal children.

On November 10, 1974, Silkwood underwent whole body and chest counting procedures at Los Alamos Scientific Laboratory. On the evening of November 13th, she was killed in an automobile accident while on the way to deliver to a *New York Times* reporter documents establishing falsification of quality control records at Appellees' facility.

Subsequent to her November 7th contamination, it was discovered that insoluble plutonium had been added to urine and fecal samples Silkwood had been submitting in the prior four weeks as part of a routine bioassay program. No at-work source of any of the contaminations was ever established by Appellees' management or health physics personnel or by the AEC investigation team.[16]

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[15]The contaminated apartment had to be systematically dismantled in a month-long operation and all of her personal possessions placed in large drums for disposal.

[16]Appellees contended that Silkwood intentionally removed plutonium from the plant and contaminated herself while trying to spike a urine sample in an effort to embarass the company. However, the jury answered "No" to a special interrogatory on this issue (Appendix, p. 125a), and the Court of Appeals upheld the jury's finnding (Appendix, p. 8a).

F. Evidence of Reckless and Wanton Conduct

Appellant's evidence established that from the day the plutonium plant opened, Appellees demonstrated a total insensitivity to the extremely hazardous nature of plutonium and the activities conducted at that facility. From the poor design of the plant and selection of faulty equipment and processes to the inadequate training and constant emphasis of production over worked safety, this reckless disregard for the welfare of Appellees' employees and the general public was manifest. (Between 1971 and 1975 employees were exposed to harmful radiation in some 574 separate contamination incidents.)

Appellees designed a physical security system so that .5 gram — enough plutonium to give 38 million Americans their lifetime lung burden — could be removed without detection; Appellees' inventory system was so lax that three years after the plant was closed, over forty *pounds* of plutonium could still not be located; when a fire seriously contaminated an area of the plant, workers were required to work on production in double protective suits and full-face respirators for shifts of 10 to 12 hours — a practice described as "irresponsible" and "unexcusable" by expert witnesses.

The Appellees' training program for its new employees deliberately omitted the use of the word "cancer" in materials purportedly disclosing the risks of the job and used arcane jargon incomprehensible to the young workers, many from rural backgrounds who comprised the plant's work force.

This litany of abuse was condemned by Appellant's expert witnesses. Each of these world-renowned experts decried the conduct of the Appellees — Dr. Morgan stating it was the worst facility he had ever reviewed in his 35 years as a consultant to the nuclear industry throughout the world. He noted that there was "a callous and hardened disregard for safety by Kerr-McGee's management."

G. Evidence of Actual Malice

Appellant established actual malice and personal animus directed toward Karen Silkwood as a result of her union and information gathering activities. (See Appendix, pp. 132a-136a).

H. Evidence of Violation of Regulations

At trial, Appellant established that, as to Karen Silkwood, Appellees violated AEC regulations governing radiation exposures for the general public and nuclear workers as well as the As Low As Practical standard. Additionally, Appellees repeatedly violated AEC requirements with regard to inventory and accountability controls, physical security, training, management and reporting. In short there was ample evidence to warrant punitive damages, as the trial court held in rejecting Appellee's challenges to the verdict. The Court of Appeals did not dispute the adequacy of the evidence to support the jury's punitive damage verdict.

WHY THIS COURT SHOULD EXERCISE ITS PLENARY POWER

A. Introduction.

This Court should exercise its plenary power in this case because the Court of Appeals below rendered an opinion which is legally incorrect, unsound, and fundamentally unjust — not only to Appellant herein, but to individuals and states across the country.

The decision below decrees a *per se* rule of absolute immunity from state law-authorized punitive damages for all[17] companies which handle nuclear materials. This absolute protection against punitive damage liability would apply without regard to how reckless or even intentional the wrongful conduct may be and regardless of the degree of resultant harm to members of the public.[18]

If approved by this Court, the decision below would preclude punitive damages in the 46 states which authorize them. Citizens in each of these states would be deprived of the prophylactic protection against future reckless conduct which their state law provides. The deprivation would be

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[17]The concurring justices in *Intl. Bro. of Electrical Wkrs.* v. *Foust*, 442 U.S. 42 (1979), were critical of the declaration of a *per se* bar to punitive damages in the context of the Railway Labor Act. Much of their analysis applies to the *per* se bar to punitive damages by the court below.

[18]The evidence Appellant presented at trial of Appellee's misconduct was found ample to justify a large punitive damage verdict by the trial court in upholding the $10 million punitive damage verdict which the jury found to be appropriate. The Appeals Court below did not challenge the finding that the jury's punitive damage verdict was fully justified by the evidence presented at trial.

not only to individual citizens but to the states as well. States would be deprived of their right and the power to perform their duty, to protect the health and welfare of their citizens. Also diminished is their right to have respected state laws of general application which are unquestionably a valid exercise of state prerogatives.[19] The decision thus disturbs, in a significant way, the delicate balance between federal and state governmental authority in our federal union of states. Thus, if state punitive damages for nuclear facilities are subject to preemption because the state's sanctions could interfere with the federal enforcement mechanism, punitive damages could be preempted any time a company is subject to a federal regutory agency which has the authority to impose fines.

This is the first case involving nuclear power in which punitive damages have been awarded by a jury. It was the first case to reach the courts involving claims for personal injuries and property damages from an escape of dangerous radiation into the public sector and the first to establish strict liability as well.[20]

This case also demands review because the Court below has premised its far-reaching nullification of state laws

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[19]Appellant is informed that concerns of state governments will be expressed directly to this Court in the form of amicus briefs in support of this Jurisdictional Statement.

[20]The court below easily upheld the trial court's ruling that damages may be recovered under a strict liability theory under Oklahoma law. The court flatly rejected the contention of appellees that permitting recovery under strict liability without requiring violations of NRC regulations would conflict with and be preempted by NRC regulations of licensed nuclear facilities.

and individual recovery rights in private lawsuits on this Court's memorandum affirmance of the Eighth Circuit's decision in *Northern States Power Co.* v. *Minnesota*. The Court's extension of *Northern States* to nullify a state tort recovery statute of general application calls for review by this Court. Indeed, the continued vitality of *Northern States* in light of developments since the decision is also an appropriate subject for review.

In concluding that *Northern States required* it to preempt, the court below did not follow *Nader* v. *Allegheny Airlines*, 426 U.S. 290 (1976). The decision below is heavily predicated on the Court's conclusion — which again has far-reaching national implications — that Congress precluded punitive damages in the Price-Anderson Act. As noted below, this determination as to Congress' implicit assumption about punitive damages is contradicted by the legislative history of the Act.

The appellate court's opinion also raises profound federal due process and equal protection questions, particularly in light of the analysis employed by this Court in *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978).

The decision presented here for review raises legal and public policy issues whose national significance cannot be denied. Some have never been addressed by this Court. Others involve apparent conflicts with principles and standards established by this Court in other cases. These considerations make this case one which fully justifies exercise of this Court's plenary power.

B. The Tenth Circuit's Ruling Erroneously Interpreted *Northern States Power Co.* v. *Minnesota* as Requiring the Court to Hold State Law Punitive Damages to be Absolutely Preempted.

Appellant submits that the Circuit erred in applying *Northern States* at all and erred in finding preemption required or even possible on the basis of *Northern States*.

Northern States was a case of quasi-*expressed* preemption and one involving a direct clash of technical regulations established by both federal and state regulatory bodies.

This case, by contrast, involves no state agency and no state regulations. The state action involved is the application of the state's general punitive damage law, along with other state liability principles in a private lawsuit. Neither the federal nor state government is even a party in the case. It also involves no clash between the state activity and the federal regulatory scheme.

Moreover, *Northern States* involved the adoption by a state of a competing regulatory scheme long after the federal system was in place. Here, the Court has encroached upon an area of law traditionally left to the states. Disregarding these fundamental distinctions the Court applied *Northern States* mechanically, instead of the analysis employed in cases involving the preemption of pre-existing common law rights.

The Court also erred in applying *Northern States* without regard to specific manifestations of Congressional intent that state tort law was to control. The section of the Atomic

Energy Act relied upon in *Northern States* was adopted in 1959.[21] After the enactment of that provision, Congress restated its unmistakeable desire that the states were to remain free to enforce their respective tort laws without restriction.[22]

Indeed, Congress has had numerous opportunities to indicate that punitive damages under state law were barred, but has never done so. Specific congressional statements of the unlimited application of state tort law and congressional silence on a desire to preempt punitives belie the inference made by the court below — that punitives would somehow be "intrusive" on the federal regulation of nuclear power.

Additionally the court below took no cognizance of the sweeping changes that have occurred in the "full objectives and purposes" of Congress since *Northern States* was decided. See STENSVAAG, *State Regulations of Nuclear Generating Plants Under the Clean Air Act Amendments of 1977*, 55 So.Cal. L.Rev. 511 (1982); *Pac. Legal Found.* v. *State Energy Resources, Etc.*, 659 F.2d 903, 926-8 (9th Cir. 1981).

These developments since *Northern States* argue against any extension of the decision. Indeed, they call into question its continued vitality,[23] indicate that Congress does not

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[21] 42 U.S.C. §2021(k) (Appendix, p. 144a).

[22] *e.g.* See S.Rep. No. 1605, 89th Cong., 2nd Sess. (1966) (Appendix pp. 128a-130a).

[23] Commentators have noted that in light of the subsequent developments, the *Northern States* decision may no longer be viable. See WOYCHICK, *State Opportunities to Regulate Nuclear Power and Provide Alternative*

intend to favor nuclear power over all other energy sources and recognizes safety in nuclear facilities as a paramount concern.[24]

C. The Decision Below Violated the Standards Respecting Preemption of Common-Law Rights Recognzied by This Court.

The court below erred in extending *Northern States* to require nullification of a general state tort statute under the preemption doctrine.

The state's police powers are not to be superseded "unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Accord, Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978). All expressions of Congressional intent are to the contrary — state tort law is to be applied to nuclear incidents which do not rise to the level of an Extraordinary Nuclear Occurrence (ENO) under the Price-Anderson Act.

Even if unexpressed, a Congressional preemptive intent may be implied. See, e.g., *Ray* v. *Atlantic Richfield, supra, Rice* v. *Santa Fe Elevator Corp., supra; City of Bur-*

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[23] (Continued)
Energy Supplies: Part I, 15 U.S.F.L.Rev. 129, 148 (1980); MEEK, *Nuclear Power and State Radiation Protective Measures: The Impotence of Preemption*, 10 Env.L. 1, 66 (1979).

[24] The opinion below implicitly assumes that any state action, including an award of punitive damages, which might possibly impede the development of nuclear power poses a conflict and is subject to preemption. However, as Judge Doyle observes in his dissenting opinion, a large award of actual damages impedes just as much as an equivalent punitive award. (Appendix, p. 38a)

bank v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973). Still, the Congressional intent to preempt must be unambiguous. *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 146-47 (1963).[25]

While preemption may be appropriate if the state law *conflicts* with the federal law, the cases make it clear that conflicts are not to be lightly inferred; the initial presumption is in favor of the validity of the state law.[26]

This Court has stated that the proper judicial approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117, 127 (1973). The court below made no effort to reconcile Oklahoma's punitive damage statute with the federal regulatory framework applicable to nuclear facilities — an easy task, for they are completely harmonious. Nor did the court demonstrate how the jury's punitive damage verdict in this case would obstruct or interfere with the federal regulatory plan established by Congress.

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[25]No preemptive intent can be inferred simply from the fact that the federal regulatory pattern is comprehensive, *DeCanas* v. *Bica*, 424 U.S. 351, 359-60 (1976); *N. Y. State Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 415 (1973), or from the fact that the federal law touches on an area of predominantly national concern. *DeCanas* v. *Bica*, *supra*, at 354-55.

[26]Courts are not to *seek out* conflicts between the state and federal laws where none clearly exists. *Huron Portland Cement Co.* v. *Detroit*, 360 U.S. 440, 446 (1960); *Goldstein* v. *California*, 492 U.S. 546, 554 (1973). A conflict will be found "where compliance with both federal and state regulations is a physical impossibility," *Florida Lime*, *supra*, at 142-43; or where the state law "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

A variety of decisions of this Court have clearly enunciated the principle that in cases involving state police powers and laws protecting interests deeply rooted in local feelings and responsibility, great deference must be given to the state law. The presumption should be against federal preemption of the state law.[27]

The punitive damages statute preempted by the court below is unquestionably a law designed to protect the public and one which involves the most fundamental local responsibilities and self-protection interests.

In *New York Telephone, supra*, the Court recognized that laws protecting against *personal torts* or violence to property . . . have defined the "local feeling and responsibility" exception to preemption. 440 U.S. at 570. (Emphasis added.)

Plainly the punitive damages statute at issue here fits this definition.

In *Nader* v. *Allegheny Airlines*, 426 U.S. 290 (1976), this Court defined the standards for finding pre-existing common law rights preempted in these terms:

> "Even absent a savings clause, unless it is found that the preexisting right is so repugnant to the statute that the survival of such right would, in effect, deprive the subsequent statute of efficacy, in other words, render

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[27]See, *e.g.*, *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959); *N. Y. Tel. Co.* v. *N. Y. St. Dept. of Labor*, 440 U.S. 519, 540 (1979); *Reid* v. *Colorado*, 187 US. 137, 148 (1902). ("It should never be held that Congress intends to supersede . . . the police powers of the state . . . unless its purpose to effect that result is clearly manifest.")

it nugatory," the right must stand. 426 U.S. 290, 299, citing *Texas & Pac. R. Co.* v. *Abilene Cotton Co.*, 204 U.S. 426 (1907).

Congress' pronouncements that state tort law is to control constitutes just such a savings clause.

Cases arising in the labor law context — where there is a clear Congressional intent to occupy the field, unlike the situation in this case — likewise indicate this Court's extreme reluctance to find state common law remedies preempted.[28]

The general rule of deference to state legislation applying the historically recognized police powers of the state is especially strong where health and safety issues are involved.[29] The exercise of state police power is to be superseded only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together. *Kelly* v. *Washington*, 302 U.S. 1, 10 (1937); *Askew* v. *American Waterway Operators, Inc.*, 411 U.S. 325, 341 (1973).

Appellant has been unable to find a single instance in which a state common law tort remedy of general applica-

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[28]*See, e.g., Farmer* v. *United Broth. of C & J of America, Local 25*, 430 U.S. 290 (1977); *Automobile Workers* v. *Russell*, 356 U.S. 634, 646 (1958); *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656 (1950).

[29]See *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, 211-213 (1971); *Terminal R. Assn.* v. *Brotherhood of R. Trainmen*, 318 U.S. 1, 6-7 (1943); *Reid* v. *Colorado, supra. See, also*, Comment, *A Framework for Preemption Analysis*, 88 Yale L.J. 363 (1978). ("Laws that protect persons inside the state borders from physical injury have received the greatest deference from the Court.")

tion has been held preempted by federal legislation under the Supremacy Clause. Where punitive damages have been disallowed the basis has been that the federal statute did not provide authorization for them.

The question of whether a civil action or some aspect of it is subject to preemption under Article VI of the Constitution has been presented in very few cases. Those courts which have addressed the issue have usually rejected preemption as the dispositive formula. See cases cited by Judge Doyle at Appendix, pp. 34a-35a, n.2.

The decision below did not determine, nor could it, that application of Oklahoma's punitive damage statute to a licensed nuclear facility would "render federal regulation of nuclear facilities nugatory," "produce an irreconcilable conflict," or "stand as an obstacle to the accomplishment of the full purposes and objectives of Congress." In reality, Oklahoma's law and the federal scheme do not conflict at all.

It cannot be disputed that Congress contemplated that state tort law is to be applied[30] to a case below the ENO threshold, and that the state may impose a standard of care on nuclear operations without limitation.[31]

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[30]The court below *upheld* the imposition of state-based strict liability and rejected appellee's position that preemption decreed that liability could not be imposed unless a violation of the federally-mandatted standard of care be shown.

[31]In the Three Mile Island incident proceedings the NRC itself acknowledged that state law controls and, although this verdict had been rendered and a number of TMI-related suits seeking punitive damages had been filed, the NRC has never indicated in its numerous orders, publications and pronouncements that punitive damages are preempted. 45 Fed. Reg. 2590-5 (April 23, 1980).

Certainly the imposition of punitive damages for reckless, willful and wanton conduct in violation of a state standard of care does not constitute an obstacle to the *full* purpose[32] and objectives of Congress: to protect the common defense and security and the health and safety of the public. 42 U.S.C. § 2014(d). Rather, as an integral part of state law, it properly supplements the federal standard of care by deterring recklessness.

General punitive damage statutes unquestionably represent a valid exercise of the historically respected authority of states' police powers and their right and duty to safeguard the health and welfare of their citizens. To nullify such an exercise of state authority, especially without any Congressional expression requiring such a result, represents a serious interference with the state's prerogatives and the rights of state citizens to the protection of their state's protective laws.

D. The Circuit Court Erroneously Assumed That the Price-Anderson Act Precludes Punitive Damages.

The lynchpin of the opinion below is the assertion that no punitive damages may be awarded under the Price-Anderson Act in the event of an Extraordinary Nuclear Occurrence (ENO). While acknowledging that neither Price-Anderson nor its legislative history dictates this result, the Court seizes upon an isolated quote from *Duke*

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[32]For an example of a proper consideration of the *full* Congressional purpose in an area of federal occupation — patent law — see *Kewanee Oil Co.* v. *Bicron Corporation*, 416 U.S. 470 (1974).

Power to construct a negative pregnant.[33] From this erroneous assumption, the Court apparently reasons that to allow a plaintiff to recover punitive damages under a state statute (when a plaintiff in federal court under Price-Anderson cannot) would "substantially compete" with the federal scheme.

Contrary to the Court's assertion, the availability of punitives under Price-Anderson *was* considered by Congress: an early proposal by the AEC would have excluded "willful damages" from the indemnity agreement for licensees and contractors. Thus, the term "public liability" as used throughout the Act would have excluded punitive damages as well as workers' compensation and war damages. This suggestion was specifically rejected by the Joint Committee on Atomic Energy for licensees, S.Rep. No. 296, 85th Cong., 2nd Sess., 17-18 (1957) and contractors, *Hearings on Governmental Indemnity and Reactor Safety*, 85th Cong., 1st Sess. 176 n.318 (1956). Moreover, none of the insurance policies submitted by the industry or the indemnification contracts executed by the government with its contractors excluded punitive damages from coverage. *Hearings on Governmental Indemnity and Reactor Safety*, pp. 101-103 (1957), GREEN, ROWDEN & KRAMER, *The Three*

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[33]Price-Anderson "implicitly assumed that only compensation damages will be awarded" (Appendix, p. 22a). The court reasons that since Price-Anderson does not specifically authorize punitives, and *does* provide for compensation, then the remedy is limited to compensation *only*. The obvious rejoinder to this is provided by the concurring opinion in *International Bro. of Electrical Wkrs.* v. *Foust*, 442 U.S. 42, 54-55 (1979): the court has converted the floor beneath the plaintiff's remedies into a ceiling on top of them.

Mile Island Episode: Liability and Financial Implications, 1979, 2 Energy Law Serv. (CALLAGHAN) § C.46 n.15 at p. 55.

As adopted in Price-Anderson, the term public liability entails "any legal liability arising out of or resulting from a nuclear incident," with the exception of workers' compensation and was damages.[34] Certainly, the adoption of this definition coupled with the legislative history and position taken by the insurance industry belies a negative pregnant construction.[35]

While a policy argument might be made for limiting the recovery of punitives in a full-blown nuclear catastrophe,[36] the availability of punitives for an ENO demonstrates, *a fortiori*, that punitive damages have not been precluded for a sub-ENO incident.

E. The Nullification of the Jury's Punitive Damage Verdict on Preemption Grounds Represents a Denial of Due Process and of Equal Protection of the Laws.

The decision below also demands appellate review by this Court because it involves due process and equal pro-

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[34]So limited, public liability is used throughout Price-Anderson, *e.g.*, 42 U.S.C. §§ 2210(a), 2210(c), 2210(m), 2210(n)(2), 2210(o).

[35]Again paraphrasing the *Foust* concurring opinion — if there is any negative pregnant to be drawn, it is that a nuclear operator chargeable with compensatory damages, may be taxed with punitives, too. 442 U.S. at 55.

[36]*e.g.* If the $560 million ceiling was exceeded by the addition of punitive damages, individual claimants might be denied full recovery. However, the NRC's definition of an ENO would allow an incident which fell far short of the ceiling to qualify and no such threat of inadequate compensation would ever be presented. See 10 C.F.R. §140.81-.85 (1980).

tection problems far more serious, direct and pervasive than those considered in *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978).

In *Duke Power*, the Court upheld the Price-Anderson Act and its $560 million limitation of liability against due process and equal protection challenges. In upholding the limit on collective recovery, the Court emphasized that the risk of a nuclear incident which would involve sufficient damages to exceed the liability limit was exceedingly small. 438 U.S. at 85-86. The Court also took cognizance of Congress' pledge to "review the problem and take appropriate action should the fund created be inadequate." 438 U.S. at 86-87. The Court held that "the Congressional decision to fix a $560 million ceiling at this stage in the development and production of nuclear power to be within permissible limits and not a violation of due process." 438 U.S. at 87.

The Court found the equal protection challenge unpersuasive in part because of the general rationality of the liability limitation in the context of a recovery mechanism designed for dealing with the conjectural possibility of a nuclear catastrophe involving large numbers of people and severe damages.[37]

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[37]The court declined to reach the Just Compensation Clause claim raised by the appellees because of the availability of the Tucker Act, 28 U.S.C. §1491. See 438 U.S. at 94, n.39.

The Tucker Act issue does not arise in this case. Whether the eradication of the jury's lawful award to appellant of $10 million punitive damages constitutes a taking of property without just compensation is squarely put before this Court by the holding that the state punitive damages statute and the jury's verdict under it are absolutely preempted.

The due process challenge was rejected in large part because of the Court's conclusion that the recovery mechanism provisions of the Price-Anderson Act provided a reasonably just substitute — a satisfactory *quid pro quo* — for the common law rights which would be lost if aggregate claims would exceed the $560 million ceiling. 438 U.S. at 88.

This case does not involve conjectural limitations of recovery rights or any reasonably just substitute for the rights supplanted. Here, a pre-existing common law right has been totally abrogated without any substitute for the rights lost. Appellant has had none of the benefits provided by Price-Anderson but has been left to the common law remedies "not known in modern times for either their speed or economy." 438 U.S. at 92. Moreover, the deprivation of rights and of property involved here is not speculative, but direct and immediate. A citizen has been deprived of a $10 million punitive damage verdict rendered by a jury to whose judgment appellant was Constitutionally entitled. The verdict was amply supported by the evidence and met the legal standards for the award of punitive damages under Oklahoma law.

This verdict has been nullified by an appellate court for this citizen, and punitive damages are henceforth to be denied to all citizens who may become victims of serious misconduct by nuclear facilities,[38] because of a general apprehension by the courts below that this state law remedy

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[38]Only four states — Washington, Louisiana, Nebraska and Massachusetts — do not allow punitive damages in tort. The effect of the decision below would be to invalidate the long-standing punitive damages remedy with regard to the most serious and unjustified torts by nuclear facilities.

would interfere with the federal regulatory program in some unspecified way. There is no rational basis for this serious deprivation of rights. Victims of nuclear torts would be denied both relief and protection which is available to all other citizens. Companies which handle radioactive materials would have a liability shield for their reckless or malicious conduct which no other companies enjoy.

Punitive damages are part of the full tort recovery rights provided by state law. They compensate the victim of reckless conduct for shouldering the burden of securing judicial redress which will protect the public at large. It is true that their primary purposes are deterrence and punishment rather than specifically to make an injured party whole. Punitive or exemplary damages are intended to punish a transgressor for the benefit and protection of the public. *Cox* v. *Theus*, 569 P.2d 447, 450 (Ok. 1977). This does not mean, however, that they can be denied without regard to due process or equal protection through the application of some kind of implicit right-privilege distinction.

Under Oklahoma law, whether punitive damages are to be awarded and, if so, in what amount are questions for the jury. See *Reed* v. *Fichencord*, 219 P. 937 (Ok. 1923); *Oller* v. *Hicks*, 441 P.2d 356 (Ok. 1967); *State ex rel Pollution, etc.* v. *Kerr-McGee Corporation*, 619 P.2d 858 (Ok. 1980). See also 22 Am.Jur.2d, Damages, § 341.

While the jury has discretion as to the award of punitive damages, the injured party has a right to the jury's consideration. If the legal requisites are met, it is reversible error for a trial judge to refuse to submit punitive damages

for a jury's consideration. *State ex rel Pollution, etc.* v. *Kerr McGee Corporation, supra, Oller* v. *Hicks, supra, Sopkin* v. *Premier Pontiac, Inc.*, 539 P.2d 1393 (Ok. App. 1975).

Punitive damages are for the jury's determination because within our system of justice the jury acts as the conscience and the watchdog of the community. Through the mechanism of punitive damages, juries can protect their fellow citizens from injurious conduct with the condemnatory and deterrent effects of a punitive damages verdict.

An absolute preemption of punitive damages precludes this history jury function and represents an interference with a basic feature of the justice system, not a mere denial of a windfall benefit. Moreover, this blanket denial of punitive damages directly injures the public interest which punitive damage awards are designed to protect.

Citizens who are victims of reckless or willful misconduct in other industries which are heavily regulated by the federal government[39] retain their rights to punitive damages if they can meet the evidentiary prerequisites. There is no valid basis in the Constitution, the Atomic Energy Act or overall national policy[40] for uniquely denying the right

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[39]For example, punitive damages, may be recovered against aircraft, automobile, drug and food manufacturing firms despite the heavy regulation of these industries by the federal government. Nor does the Consumer Product Safety Act preclude punitive damages for dangerously defective manufacturing practices in other industries.

[40]There is no barrage of outstanding punitive damages verdicts threatening the industry's solvency. Because of the enormous care and responsibilities required by the dangerous potential of radioactive materials, instances where there has been misconduct egregious enough to warrant punitive damages should, hopefully, be quite rare.

to recover punitive damages to those who are injured by reckless or willful misconduct by nuclear facilities.

CONCLUSION

A split panel of the Tenth Circuit Court of Appeals has held a state punitive damages statute preempted as repugnant to the Supremacy Clause of the U. S. Constitution and to the Atomic Energy Act. That holding qualifies this case for mandatory appellate review pursuant to 28 U.S.C. § 1254(2).

This case is plainly not one for summary affirmance. The unprecedented analysis and conclusion of the Court below and the inconsistency of the decision with prior rulings of this Court call for full appellate review.

The decision profoundly affects the rights of individual citizens as well as the authority of sovereign states, guaranteed by the Tenth Amendment of the U. S. Constitution, to protect their citizens by application of the state's laws.

The absolute shield against punitive damages granted below was never enacted by Congress — nor could it be passed by Congress. The public outcry would be too great. It was never claimed below by appellee or even by the nuclear industry's trade association, and this unprecedented immunity is not afforded to any other industries, including those heavily regulated by the Federal Government.

Because of the vast significance of this case and the legal and public policy questions raised by the decision

below, this Court should note probable jurisdiction and set this case for plenary review.

Respectfully submitted,

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APPENDIX

[Filed Dec. 11, 1981]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

BILL M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, Deceased, Plaintiff-Appellee,	)	
v.	)	
	)	No. 79-1894
THE KERR-McGEE CORPORATION, a Delaware corporation, and KERR-McGEE NUCLEAR CORPORATION, a Delaware corporation, Defendants-Appellants.	)	

Appeal from the United States District Court
For the Western District of Oklahoma
(D. C. No. CIV. 76-0888-T)

William G. Paul and Glenn W. McGee, Oklahoma City, Oklahoma, (L. E. Stringer, Richard C. Ford and John J. Griffin, Jr., of Crowe, Dunlevy, Thweatt, Swinford, Johnson & Burdick, Oklahoma City, Oklahoma; C. Lee Cook, Jr., William Van Hagey, Stephen A. Gorman and Pamela J. Kemplin, of Chadwell, Kayser, Ruggles, McGee & Hastings, Chicago, Illinois; and Elliott C. Fenton and Larry D. Ottaway of Fenton, Fenton, Smith, Reneau & Moon, Oklahoma City, Oklahoma, with them on the briefs) for Defendants-Appellants.

Arthur R. Angel, Oklahoma City, Oklahoma, (Jim Ikard, Oklahoma City, Oklahoma; G. L. Spence, Jackson Hole, Wyoming; and Daniel P. Sheehan, Washington, D. C., with him on the briefs) for Plaintiff-Appellee.

Harry H. Voight, Leonard M. Trosten and Michael F. McBride of LeBoeuf, Lamb, Leiby & MacRae, Washington, D. C., and Harvey S. Price, General Counsel for Atomic

Industrial Forum, Inc., Washington, D. C., filed a brief for amicus curiae Atomic Industrial Forum, Inc.

Karin P. Sheldon, Sierra Club Legal Defense Fund, Washington, D. C., filed a brief for amici curiae Environmental Policy Institute and Sierra Club.

Before DOYLE, McKAY and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

This is an appeal by Kerr-McGee Corporation and Kerr-McGee Nuclear Corporation (hereinafter collectively referred to as Kerr-McGee) from judgments after jury trial in a diversity suit brought against them by Bill M. Silkwood as administrator of the estate of Karen Silkwood, deceased. The action was based upon common law tort principles[1] under Oklahoma law, and sought damages for injuries (primarily fear and anxiety) suffered by Karen Silkwood during a nine-day period as a result of plutonium contamination occurring November 5, 6, and 7, 1974. Her death on November 13, 1974, in an unrelated automobile accident marked the end of any damages that might have been suffered had she lived beyond that date. The jury awarded $500,000 damages for these injuries and an additional stipulated $5,000 for property in her apartment that had to be destroyed because it was contaminated. In addition it awarded $10,000,000 punitive damages. The opinion of the trial court overruling Kerr-McGee's post-trial motions is reported at 488 F.Supp. 566 (W.D. Okl. 1979).

A number of issues are raised and argued on appeal, including applicability of the Oklahoma Workers' compen-

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[1] Civil Rights Act and federal constitutional claims were also asserted in the original petition. The trial court's dismissal of those claims was affirmed in a separate appeal. *Silkwood* v. *Kerr-McGee Corp.*, 637 F.2d 743 (10th Cir. 1980), *cert. denied*, ___ U.S. ___, 102 S.Ct. 132, 70 L.Ed.2d 111 (1981).

sation Act as the exclusive remedy, federal preemption, standard of care, applicability of strict liability, Availability of certain defenses, excessiveness of actual damages, invalidity and excessiveness of punitive damages, insufficiency of the evidence, and denial of a fair trial because of adverse publicity, prejudicial conduct of counsel, and errors in evidentiary rulings and instructions to the jury. We recite below such essential facts and treat such of these issues as are necessary to resolve all aspects of the appeal.

I. *Personal Injury*

Karen Silkwood was a laboratory analyst at the Cimmaron plant of Kerr-McGee located near Crescent, Oklahoma. The plant fabricated fuel pins containing plutonium for use as reactor fuel. Silkwood was contaminted by plutonium on November 5, 6, and 7, 1974, and the parties have stipulated that this plutonium came from the Kerr-McGee plant. Precisely how and when the contamination occurred is not stipulated and there is little evidence to fill this void.

Plutonium is an artificially produced radioactive chemical element which has been instrumental in the development of nuclear weapons and nuclear power. It emits alpha particles, beta particles, neutrons, gamma rays, and x-rays. The extent of radiation damage to human cells exposed to plutonium is dependent upon the amount of energy in the radiation. Alpha particles have the largest mass, carry the greatest amount of energy, and are the most hazardous. Damage can occur when alpha particles strike a cell. Damage to an individual cell is not, however, invariably harmful to the human body; a cell is capable of repairing itself and the body normally sheds and replaces millions of cells on a continuous basis. It is acknowledged, however, that plutonium is one of the most carcinogenic and dangerous substances known.

Silkwood was a member of the Oil, Chemical and Atomic Workers Union (OCAW), which represented some

of the workers at Kerr-McGee's plant. As an elected member of the union negotiating team, Silkwood was responsible for health and safety matters. In September 1974 she, together, with her fellow committee members, met with OCAW leaders in Washington, D. C., and presented charges to the Atomic Energy Commission (AEC) of numerous health and safety violations by Kerr-McGee. The AEC required documentation of the charges, and Silkwood was assigned the job of collecting this documentation. Silkwood was engaged in collecting information and recording it in notebooks and on tapes from September 1974 until the time of her death.

There is no real dispute in the evidence concerning Silkwood's contamination. She reported to work at the Cimmaron plant on November 5, 1974, at 1:20 p.m. At 2:45 p.m. and at 3:15 p.m., before and after taking a break, Silkwood monitored herself with plutonium detecting devices provided by Kerr-McGee in accordance with the company policies and AEC license requirements. No plutonium was detected on her person. At about 3:45 p.m. Silkwood began to work in two glove boxes containing plutonium. A glove box is a supposedly impervious box surrounding the plutonium processing equipment which has glove holes permitting the operator to work on the equipment or with the plutonium from outside the box. Silkwood again monitored herself before and after her break at 5:30 p.m. and at 5:45 p.m., and at those times detected no contamination. She continued to work in the glove boxes and, upon withdrawing her hands from one of the boxes at about 6:30 p.m., she found contamination. Further checks were made in the laboratory and other contaminations were found, particularly inside the gloves in the glove box in which Silkwood had been polishing and cleaning plutonium.

Contamination was found on Silkwood's left hand, right wrist, upper arm, neck, face, hair, and in her nostrils. Pursuant to regulations, Silkwood was immediately decontaminated and placed on a five-day voiding collec-

tion program, and furnished urine and fecal kits to take home for the purpose of obtaining samples which would be sent to the United States testing laboratory for analysis. Later that day Silkwood returned to work, but not to the glove boxes, she monitored herself when she left work at about 1:10 a.m. and found no contamination. The glove box was later tested by the AEC investigators, and no leaks were found. Further, the investigators found no significant airborne contamination in the laboratory.

The next day, November 6, 1974, Silkwood arrived at work at 7:50 a.m., and did some paper work in the lab until 8:50 a.m., at which time she left to attend a union meeting. At that time she tested herself and found contamination on her hands; tests showed fixed contamination on her right forearm, face, and neck. Her hands were decontaminated; since the other spots appeared to be fixed contamination she was allowed to attend the union meeting. She returned to the health office at 4:30 p.m., where slight contamination was found on her right forearm, neck and face, and in her nostrils. She was again decontaminated and, at her request, her locker and auto were tested and found to be free of contamination.

On November 7, 1974, when she reported to work Silkwood went directly to the plant's health physics office. She was found to be contaminated in her nostrils and on her hands, arms, chest, back, neck and right ear. Four urine and one fecal sample collected on November 5th, 6th and 7th were found to be contaminated, although the exterior of the kits showed no contamination. The parties stipulated that urine samples brought to the plant had been spiked with plutonium; that is, they contained insoluble, not naturally excreted, plutonium. Also, Silkwood's apartment was found to have been contaminated, with highest concentrations of plutonium found in the bathroom and on a package of bologna and cheese in the refrigerator.

Silkwood's roommate, Sherri Ellis, was also a laboratory analyst at Kerr-McGee, and was found not to be con-

taminated when she left work at 8:00 a.m. on November 7th after working a midnight shift. After returning to the apartment, Ellis used the bathroom and retired to her bedroom. Subsequent checks revealed contamination of Ellis' buttocks and hands. Ellis' auto and the refrigerator where her lunch had been placed in the plant lunchroom were free of contamination. Silkwood's boyfriend, who spent the night of November 6th in Silkwood's apartment, had left the apartment at about 7:00 a.m., on November 7th after using the bathroom. Neither he, his car, nor his residence were contaminated.

Silkwood's possessions were destroyed and Silkwood was sent to the Los Alamos Scientific Laboratory in New Mexico to undergo further tests concerning her contamination. She reported back to work on November 13th at which time she was reassigned. She participated in a union negotiating session that day, met with AEC inspectors concerning her contamination, and attended a union strategy session. On her way to meet a *New York Times* reporter and an OCAW leader, Silkwood was killed in an automobile accident. A subsequent autopsy revealed that the amount of plutonium within Silkwood's body at the time of her death was between 25% and 50% of the permissible lifetime body burden allowed by the AEC for plutonium workers.

Silkwood made statements that she had spilled her urine sample in her bathroom between 7:00 and 7:50 a.m. on November 7th, after her boyfriend left and before her roommate returned to the apartment from work. Silkwood stated that at the time she spilled the urine sample, a package of bologna was on top of the commode, where she had placed it in anticipation of preparing a sandwich to take to work. Following the spilling of the sample, Silkwood stated that she wiped off the bathroom floor with a tissue and placed the bologna back in the refrigerator. That evidence was admitted only to show Silkwood's state of mind, motivation, or intention relevant to the issue whether

she intentionally removed the plutonium from the plant; it was not admitted to show the truth of the statements.

The only other evidence supporting inferences relevant to where and how Silkwood was contaminated is as follows. Except for the fact that Silkwood was in a radiation zone for an hour on November 6 before discovering contamination on her person, and Silkwood's statement that she thought she was inadequately decontaminated on November 5, there is no evidence of where, when or how she became contaminated on November 6th. She did not work the glove boxes that day and no other contamination was observed. Apparently employees were not monitored for radiation upon arriving at work, although they were subject to self and other monitoring each time they removed their hands from glove boxes and when exiting rooms and air locks. Evidence showed Silkwood was sloppy in her safety habits, failing to monitor herself or tuck her hair into the cap she was required to wear in the laboratory.

The insoluble plutonium used to spike the urine samples was not of the same batch Silkwood was working with in the glove boxes at the time of her exposures. The material could have come, however, from a slot box in the laboratory area to which Silkwood and other Kerr-McGee employees had access. The Kerr-McGee inspection system would not detect amounts of plutonium of less than about 1/2 gram taken from the plant in a nonmetallic container. (The amount in Silkwood's apartment was estimated at less than .0003 gram.)

There was evidence that Kerr-McGee's supervisory employees knew Silkwood was attempting to gather evidence of Kerr-McGee's negligent and improper practices in the operation of the plant and that some disapproved of her and these activities. There was also evidence that Silkwood was unhappy with a reprimand she had received shortly before her November 5 contamination and that she wanted to embarrass Kerr-McGee.

In an obvious attempt to avoid application of the workers' compensation law, the complaint asserted that all exposures originated in Silkwood's apartment. A pretrial motion for summary judgment based upon the exclusive application of the workers' compensation law was properly denied because factual issues had not been resolved as to how the exposure occurred. The Kerr-McGee assertion that workers' compensation applied to the personal injuries was reasserted at the conclusion of the case and in the motion for judgment n.o.v. The trial judge's refusal to grant the motions or to instruct the jury on the workers' compe sation issue was based upon his view that Kerr-McGee had the burden of proving job relatedness of the contamination and that there is no presumption upon which Kerr-McGee was entitled to rely.

As the trial judge recognized, there was absolutely no evidence that someone other than Silkwood or a Kerr-McGee employee intentionally or accidentally exposed Silkwood to plutonium contamination. No intentional contamination, either by Silkwood or Kerr-McGee, was established. The judge properly refused to give a jury instruction on intentional contamination by action of a Kerr-McGee employee, for lack of credible evidence. The evidence that Kerr-McGee employees might have disliked Silkwood and her evidence-gathering activities and that plutonium could and did escape the plant is not enough to support a finding that Kerr-McGee operatives intentionally exposed Silkwood to contamination. The only plausible method by which Kerr-McGee could intentionally contaminate Silkwood would be by placing plutonium in the urinalysis kits it sent home with her; there is no evidence to support such a theory. The court gave an instruction permitting the jury to find whether Silkwood intentionally removed plutonium from the plant. The jury found she did not. We agree that sufficient evidence was presented to support the court's instruction, and that the evidence was not so strong as to require the jury to find Silkwood intentionally took the plutonium.

The trial court refused for lack of evidence to summit to the jury the issue of an accidental contamination of Silkwood. Here we disagree. Indeed, we hold that, in light of the lack of evidence of intentional contamination by Kerr-McGee operatives, Silkwood, or others, the presumptions and burdens of proof applicable to workers' compensation issues required the court to grant judgment n.o.v. holding that workers' compensation was the exclusive remedy for personal injuries suffered by Silkwood.

The Oklahoma Workers' Compensation Act, Okla. Stat. Ann. tit. 85 (West 1971 & Supp. 1980), provides that the employer shall pay compensation "for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment . . ." *Id.* § 11. Section 12 of the Act provides that the liability prescribed in section 11 "shall be exclusive and in place of all other liability of the employer and any of his employees, at common law or otherwise . . ." Section 27 clarifies the scope of coverage indicated in section 11 by creating a presumption. "In any proceeding for the enforcement of a claim for compensation under this act, it shall be presumed in the absence of substantial evidence to the contrary: 1. that the claim comes within the provisions of this act." *Id.* § 27.

No Oklahoma case addresses directly the question whether an employer as well as an employee may invoke the presumption of coverage. But the courts that have construed similar liberal construction rules have unanimously held that the same rules of coverage apply regardless of who seeks their application. *See Arnold* v. *Shell Oil Co.*, 419 F.2d 43 (5th Cir. 1969); *Jackson* v. *Southern Pac. Co.*, 285 F.Supp. 388 (D.Nev.1968); *Freire* v. *Matson Nav. Co.*, 19 Cal.2d 8, 118 P.2d 809 (1941); *Wilburn* v. *Boeing Airplane Co.*, 188 Kan. 722, 366 P.2d 246 (1961); *Thibodaux* v. *Sun Oil Co.*, 40 So.2d 761 (La.App.1949), *aff'd*, 218 La. 453, 49 So.2d 852 (1950); *Smith* v. *Alfred Brown Co.*, 27 Utah 2d 155, 493 P.2d 994 (1972).

There are persuasive reasons underlying these consistent holdings. As pointed out by the *Freire* decision, the liberal construction in favor of jurisdiction is not intended merely to ensure the benefits of the act for injured employees, thus sparing them the necessity of expensive and speculative trials; it is also intended to protect the employer from excessive judgments. 118 P.2d at 810. *See Jackson* v. *Southern Pac. Co.*, 285 F.Supp. at 389. We believe the Oklahoma Supreme Court holdings are in accord with this principle. In one case which held that an insurer's right to subrogation was abrogated by the Workers' Compensation Act, that court stated:

> "[W]e think the Workmen's Compensation Act, in effect, was reciprocal in eliminating common-law rights, it was compensatory to both employer and employee. To the employee the act provided a summary action, it insured the workmen a living wage, when injured. As to both, it took away a jury trial. As to the employer, it created a maximum loss as well as making the amount of recovery certain."

Fox v. *Dunning*, 124 Okl. 228, 255 P. 582, 585-86 (1927).

Most recently, in the case of *Harter Concrete Products, Inc.* v. *Harris*, 592 P.2d 526 (Okl.1979), the Oklahoma Supreme Court held that an employer could not be joined in a product liability action as a third party defendant because workers' compensation was the exclusive remedy.

> "Worker's compensation legislation was enacted to provide a substitute remedy to an employee for accidental injuries received during covered employment without the burden of his proving negligence. In exchange for this exposure the employer is protected from any other liability to the employee. To be equitable as well as effective, this protection must extend to *all* liability either directly or indirectly derived from the employee's injuries."

Id. at 528 (footnotes omitted) (emphasis in original).

Another reason given for an evenhanded application of the presumption is that the objective of doing equal justice cannot be attained absent a consistent application of the rules. *See Buhler* v. *Gossner*, 530 P.2d 803, 805 (Utah 1975); *Smith* v. *Alfred Brown Co.*, 27 Utah2d 155, 493 P.2d 994, 995 (1972).

Against this persuasive authority, plaintiff argues that the prefatory language to section 27 compels a decision that an employer may not avail itself of the presumption in proceedings brought outside those described in the Act. This key language provides the presumption will apply "[i]n any proceeding for the enforcement of a claim for compensation under this act . . ." Okla. Stat. Ann. tit. 85, § 27. We believe that plaintiff's construction would not only violate the aforementioned principles enumerated by other jurisdictions, but would also destroy the exclusive jurisdiction compelled by the Act. Were the presumption to be applied only when an employee brought a claim in the Workers' Compensation Court, then a certain number of borderline cases would be sustained only by operation of the presumption. If these same cases were brought at common law and were deemed not subject to the presumption, they would be found to be outside the Act. Thus, an overlapping jurisdiction would exist for a number of cases open to the election of the employee. Such a result seems to contradict the Act's clear intent, expressed in section 12, of limiting recovery to that provided in the Act for all cognizable claims. *See, Arrington* v. *Michigan-Wisconsin Pipeline Co.*, 632 F.2d 867, 871 (10th Cir. 1980). For these reasons, we believe the Oklahoma Supreme Court would hold that the presumptions contained in section 27 are applicable regardless of who seeks to make use of them.

We agree with plaintiff that inasmuch as exclusive jurisdiction is an affirmative defense, Kerr-McGee had the burden of producing evidence sufficient to demonstrate that the injuries were covered by the Act. *See Oklahoma Steel Casting Co.* v. *Banks*, 181 Okl. 503, 74 P.2d 1168 (1937).

The method of proving that an injury arose out of and in the course of employment would be the same regardless of whether it is offered by the employee to prove a claim or by the employer seeking to bar an action at common law. *See Eckis* v. *Sea World Corp.*, 64 Cal.App.3d 1, 134 Cal. Rptr. 183 (1976). The method by which injuries occurring under somewhat mysterious circumstances are proven is outlined in *In re May*, 586 P.2d 738 (Okl. 1978). In that case, representatives of a driver of a service vehicle sought recovery for the death of the driver who was found shot to death in a rural field. His log indicated that he had completed his route. The Supreme Court of Oklahoma rejected the employer's contention that because there was no competent evidence to indicate that the death arose out of and in the course of employment, the compensation award was in error. Relying on *In re Martin*, 452 P.2d 785 (Okl. 1969) and *Nebo Oil Co.* v. *Wright*, 406 P.2d 266 (Okl. 1965), the court first noted that compensation law indulges a presumption that a claim for injury is within the Act absent substantial evidence to the contrary. Any reasonable doubt is to be resolved in favor of the claimant. 586 P.2d at 740. Second, the court noted that the claimant could meet his burden of producing competent evidence that the injury occurred during the course of employment by use of circumstantial evidence. The circumstantial evidence need not exclude every other possible inference, but is only required to provide a legal and logical basis for a reasonable inference as to the existence of the fact sought to be proven. *Id.* at 740-41. Once this reasonable inference of coverage is established, a prima facie case has been made out that workers' compensation is the exclusive remedy, and it is then incumbent upon the plaintiff to show the nonexclusivity of the statutory compensation remedy as to each element of the injuries for which plaintiff seeks common law relief. *Murphy* v. *Owens-Corning Fiberglas Corp.*, 447 F.Supp. 557, 571 (D.Kan. 1977).

With these rules in mind, we again review the evidence. Silkwood was a laboratory analyst at the Kerr-McGee plant and handled plutonium in the regular course of her employment. It is undisputed that on the first day of her contamination, November 5, 1974, Silkwood was found to be contaminated after spending some three hours grinding and cleaning plutonium. Silkwood had monitored herself three times during the course of the same work period and found no contamination each time. After Silkwood was found to be contaminated, the gloves in the glove box she had been using were found to be contaminated. Silkwood was decontaminated at work and given urine and fecal kits to check for plutonium discharges. This is the only evidence relating to the November 5th exposure and it supports only one inference: that the exposure was job-related.

Of the three exposures occurring on November 5th, 6th and 7th, that of November 6th is the least understood in terms of when and where it happened. On November 6th, Silkwood arrived at work at 7:50 a.m. and performed paperwork in the laboratory, which was in a radiation zone. Apparently she was not checked for contamination at the time she arrived at work, but upon leaving the laboratory at 8:50 a.m., she checked herself and discovered contamination on her hands, her right forearm, and her face and neck. Her hands were decontaminated immediately, but to permit Silkwood to attend a union meeting the fixed contamination on the rest of her body was not decontaminated until the end of the day. At most this evidence could support an inference that the November 6th exposure occurred at the job site which was known to be a place where plutonium was present. Alternatively, the evidence might support a finding that, as Silkwood stated, the contamination discovered on November 6th was residual contamination from her on-the-job exposure of the day before. Any other inference would be far too speculative based on this record.

Upon her arrival at work the next day, November 7th, Silkwood was found to be highly contaminated. The urine sample she took that morning at her apartment was spiked and her apartment was found to be contaminated, particularly the bathroom, kitchen, and her bedroom. Her roommate was found to be contaminated on her buttocks and hands. The only reasonable explanation for the roommate's contamination is that it came from the toilet in the apartment after Silkwood had taken her urine sample and departed for work. In view of the lack of contamination of other individuals who occupied the apartment during the course of the evening of the 6th and until 6:50 a.m. on the morning of the 7th, the only reasonable inference that can be drawn from the circumstantial evidence is that the contamination of the apartment, Silkwood, and her roommate resulted from Silkwood's preparation that morning of the urine sample. It is undisputed that the urine sample was spiked, although it is not known who spiked it or from what source. Since the urine sample was prepared at the direction of her employer as a part of her job-related duties, the only inference not based on the sheerest speculation that can be drawn from the evidence is that the contamination measured on the 7th was also job-related. The only other evidence that properly can be considered leads to the same conclusion.[2]

The circumstantial evidence supports one conclusion: that Silkwood's exposure on all three occasions occurred either at the job site or in preparation of urine samples

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[2] Silkwood told AEC investigators that she believed the contamination measured on the 7th resulted from inadequate decontamination at work the day before. If this were true, it proves only that the contamination of the 7th was job-related. Furthermore, her statement about being contaminated while preparing her urine sample on the morning of the 7th, although not admitted to prove the truth of the statement, is consistent with the only reasonable inferences that can be drawn from the balance of the evidence.

for her employer. In the absence of any other evidence of offsite exposure,[3] the only reasonable inference is that all the plutonium found in her body came from her working with and around plutonium or from the preparation of job-related urine samples that were spiked. Plaintiff's own expert witness testified that no one could be sure when the exposure occurred that resulted in the deposition of plutonium in Silkwood's lungs.

While the circumstantial evidence as to the time, place, and manner of exposure is thin at best, it cannot support any conclusion other than that the exposures were job-related. Even were we to conclude that the evidence is too thin standing alone to support any conclusion, we are satisfied that, aided by the liberal construction rule favoring coverage, Kerr-McGee has established a prima facie case that the injury comes within the provisions of the workers' compensation statute. We now hold that plaintiff has not produced substantial evidence that Silkwood's injury occurred outside the course of her employment to rebut this prima facie case.

The trial court's comparison of this case to that of a factory worker engaged in the manufacture of television sets who is injured when his home television blows up is inapposite. In that case the reasonable inference is that the television is for private use, and no circumstance suggests that the explosion is related to his work rather than his ownership of the set. In the instant case, by contrast, there is a logical nexus between Silkwood's injury and her work.

Silkwood's counsel complained that Kerr-McGee's evidence was all directed to prove intentional taking by Silkwood and self-contamination. It is true that in pretrial

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[3] There was evidence that a substantial amount of Kerr-McGee plutonium was missing from the job site but no evidence, circumstantial or otherwise, connects Silkwood with that material.

investigations and at trial Kerr-McGee employees testified to beliefs and theories that no incident at the plant had been the source of the contamination, that the contamination was self-administered, that it was unlikely to have been accidental, or that she was contaminated offsite. While Kerr-McGee attempted to establish an intentional taking of plutonium by Silkwood and intentional or accidental self-contamination thereafter, it never abandoned the alternative theory of a job-related accident. Kerr-McGee could avoid liability altogether if it could establish an intentional taking by Silkwood; it could avoid a common law tort claim for personal injuries if it could establish a job-related accidental exposure. We do not consider its witnesses' statements concerning self-contamination by Silkwood as admissions that no job-related accidental exposure was possible.

Plaintiff contends that the Workers' Compensation Court has exclusive jurisdiction only if it is shown that the worker would actually have received compensation and, since it was not shown that Silkwood's injury was presently disabling, no compensation would have been awarded. Plaintiff argues that because section 12 provides that "[t]he *liability prescribed* in the last preceding section shall be exclusive" and section 11 prescribed only liability for disability or death, all non-disabling injuries may be pursued at common law. Kerr-McGee counters with an argument there was no injury to Silkwood here at all, since she did not contract cancer during her life. This Court has recognized that a complaint based upon the possibility of contracting cancer in the future as a result of past exposure to a carcenogenic substance does not state a common law cause of action. *Bussey* v. *Safeway Stores, Inc.*, (10th Cir. Sept. 19, 1978). Of course, a claim for illness already suffered is cognizable. *Id.*

Here Kerr-McGee was entitled to a finding that Silkwood's contamination was on the job, as we have discussed above. If cancer is developed from a radiation exposure

on the job, the workers' compensation law covers it. *See* Okla.Stat.Ann. tit. 85 § 11(4) (West Supp. 1980) (with reference to Okla.Stat.Ann. tit. 85 § 3(7),(10) (West Supp. 1980). In the instant case the radiation produced hysteria and fear in Silkwood and the need for medical treatment and examination. The Workers' Compensation Act requires reimbursement for medical attention from job-related accidents. *Id.* § 14. Silkwood missed time from work at least during testing, and she incurred medical expense, paid by Kerr-McGee. But even if she had not, work time loss and medical expense are not necessary requisites to finding an injury is exclusively covered by workers' compensation. If a worker on the job received a hammer blow to the thumb causing pain and suffering but no time loss, surely he or she could not sue the employer in a common law tort action. We believe the Oklahoma Supreme Court would hold that any accidental injury incurred on the job would be covered by the Workers' Compensation Act, and that the radiation exposure here is such a case. The fact the Act does not compensate for every aspect and degree of the injury makes no difference. In *Smith* v. *Baker*, 157 Okla. 155, 11 P.2d 132 (1932), a case in which a man lost his sexual organs in the course of employment, the Supreme Court of Oklahoma said, "The fact that Workmen's Compensation Act does not provide adequate relief in all cases does not authorize a civil action for recovery of damages." The Oklahoma court is in agreement with other jurisdictions that have considered this issue. *See* 2A Larson, *Workmen's Compensation* § 65.20 (1976).

We have considered plaintiffs' other contentions in regard to this issue, and find them to be without merit. We conclude the court erred in not ruling that the issue of personal injury must be determined under the Workers' Compensation Act. Our disposition on this issue eliminates the need to discuss the sufficiency of the evidence and other arguments relating to the amount of damages for personal injury and the fairness of the trial on that aspect of the case. We do not understand Kerr-McGee to contend that

the federal regulation of nuclear energy preempts application of the workers' compensation law for injuries on the job. *See* Appellants' Brief p. 56 n.*. *See also* S.Rep. No. 296, 85th Cong., 1st Sess., *reprinted in* [1957] U.S.Code Cong. & Ad. News 1803, 1819.

II. *Property Damage*

The existence here of significant damage to Silkwood's personal property in her apartment requires us to consider additional issues raised in the appeal. The Workers' Compensation Act applies only to "accidental personal injury." Okla.Stat.Ann. tit. 85, § 11 (West Supp. 1980). *See also id.* §§ 2, 3(7).

Kerr-McGee argues that the pervasive federal regulation of atomic energy precludes states from applying stricter safety standards for the handling of nuclear materials than required by AEC regulations. As applicable to the issue of its liability for actual damage to Silkwood's personal property, Kerr-McGee asserts that its substantial compliance with preemptive federal regulations is conclusive evidence of due care and precludes holding it liable under a strict liability standard.

Northern States Power Co. v. *Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035, 92 S.Ct. 1307, 31 L.Ed.2d 576 (1972), upon which Kerr-McGee places its principal reliance, declared that federal preemption precludes a state from exercising regulatory authority over the discharge of radioactive effluents from nuclear power plants in the state. *See also Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1, 96 S.Ct. 1938, 48 L.Ed. 2d 434 (1976). As *Northern States* recognizes, the determination whether the federal scheme precludes state rules is primarily a matter of the intent of Congress. Imposing a state tort law rule of strict liability for nuclear-related property damage occurring off the plant site might, in some instances, encroach upon federal regulations setting effluent or other standards. *See State Dept. of Environ-*

mental Protection v. *Jersey Central Power & Light Co.*, 69 N.J. 102, 351 A.2d 337 (1976); *Van Dissel* v. *Jersey Central Power & Light Co.*, 152 N.J. Super. 391, 377 A.2d 1244 (1977). We do not think imposition of tort liability in the instant case, in which a quantity of plutonium has escaped the plant site and caused damage, will significantly interfere with federal regulation of Kerr-McGee's plant. Further, the AEC (now Nuclear Regulatory Commission (NRC)) does not have power, except as it is involved in the administration of the Price-Anderson Act, to order a compensatory award to a victim of a nuclear incident. *See Marshall* v. *Consumers Power Co.*, 65 Mich.App. 237, 237 N.W.2d 266 (1975). Clearly there is need for such a remedy. The Supreme Court and Congress have recognized that state tort law principles are applicable to some extent in off-site damage cases. In upholding the constitutionality of the Price-Anderson Act, the Supreme Court stated that "[a]ppellees' only relevant right prior to the enactment of the Price-Anderson Act was to utilize their existing common-law and state-law remedies to vindicate any particular harm visited on them from whatever sources." *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 88 n.33, 98 S.Ct. 2620, 2638 n.33, 57 L.Ed.2d 595 (1978). The Price-Anderson Act, 71 Stat. 576 (1957) (codified in scattered sections of 42 U.S.C.), was passed to address the problem of liability for nuclear disasters which might deter the industrial development of nuclear energy. It requires AEC (NRC) licensees to purchase private insurance, creates a government indemnity fund, and establishes maximum limits to liability for an "extraordinary nuclear occurrence." 42 U.S.C. § 2210(n). For nuclear incidents below the level of an extraordinary nuclear occurrence, and the instant case is one, the rules of tort law of the state in which the injury occurred still apply.

> "[T]he bill has been drafted so that minor claims involving nuclear facilities or materials may remain subject to the traditional rules of tort law."

S.Rep. No. 1605, 89th Cong., 2d Sess., *reprinted in* [1966] U.S.Code Cong. & Ad. News 3201, 3211. *See also id.* 3203-04, 3206, 3207, 3209, 3226; S.Rep. No. 296, 85th Cong., 1st Sess., *reprinted in* [1957] U.S.Code Cong. & Ad News 1803, 1810, 1823. Kerr-McGee argues that although state tort law applies the federal regulations determine the controlling standards, foreclosing application of strict liability. But that same Senate report recognizes that a state can apply strict liability principles if it chooses.

> "[A] claimant would have exactly the same rights that he has today under existing law — including perhaps, benefit of a rule of strict liability if applicable State law so provides."

S.Rep. No. 1605, 89th Cong., 2d Sess., *reprinted in* [1966] U.S.Code Cong. & Ad. News at 3212. *See also id.* 3203, 3206, 3207.

We have no doubt Oklahoma courts would apply strict liability to this case of escape of plutonium, a highly toxic and dangerous substance. *Young* v. *Darter*, 363 P.2d 829 (Okl. 1961) (herbicide spray). *See also Kirkland* v. *General Motors Corp.*, 521 P.2d 1353 (Okl. 1974). Nuclear energy is surely an area "in which no court will, at last, refuse to recognize and apply the principle of strict liability." W. Prosser, *The Law of Torts*, § 78, at 516 (4th ed. 1971); *see Restatement (Second) of Torts* § 520, comment (g) (1977) ("Some activities, such as the use of atomic energy, necessarily and inevitably involve major risks of harm to others, no matter how or where they are carried on").

We have no trouble with proximate cause in the context of damage to personal property in Silkwood's apartment. It was stipulated that the plutonium came from the Kerr-McGee plant; clearly the property damage was the result of plutonium contamination. Regarding one who carries on an abnormally dangerous activity. *Restatement*

(Second) of Torts § 519, comment (e) (1977) states that strict liability applies to "harm that is within the scope of the abnormal risk that is the basis of the liability." The key is foreseeability. It is surely foreseeable and within the scope of the abnormal risk that radiation contamination will occur from contact with plutonium that escapes a nuclear fuel plant. Just as the risk incident to dynamite is accidental explosion, a risk incident to plutonium is accidental contamination. The jury's finding that Silkwood did not intentionally carry the plutonium from the plant to her apartment eliminated the only possible intervening cause for which any evidence was presented.

Since strict liability applies and the stipulated amount of the property damage was $5,000, claims of prejudicial publicity and other alleged trial errors would have no application to this property damage claim. While evidence excluded by the trial court concerning the state of Silkwood's health might be relevant to her personal injuries, it does not seem relevant to the jury's finding that she did not deliberately remove the plutonium from the plant. Therefore, we find no error in the judge's direction to the jury to return in its verdict $5,000 in damages for the personal property if it found no intentional taking of the plutonium by Silkwood.

III. *Punitive Damages*

Kerr-McGee makes several argument that the award of punitive damages is improper. We need consider only one, the claim of federal preemption.

As discussed above, the Price-Anderson Act contemplates that state tort law applies in at least some cases involving nuclear incidents; we have found that a claim for compensatory damages for off-site contamination caused by the escape of plutonium is one such situation. Nowhere in the Price-Anderson Act or its legislative history have

we found express mention of punitive damages. References in the Price-Anderson Act that state law may determine tort liability may be read to permit punitive as well as compensatory damages in states like Oklahoma which permit them. However, with respect to "extraordinary nuclear occurrence" which are covered by statutory insurance, indemnity fund, and liability limitations, the Price-Anderson Act implicitly assumes that only compensatory damages will be awarded. *See also Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 93, 98 S.Ct. 2620, 2640, 57 L.Ed.2d 595 (1978), ("The Price-Anderson Act not only provides a reasonable, prompt, and equitable mechanism for *compensating* victims of a catastrophic nuclear incident, it also guarantees a level of net *compensation* generally exceeding that recoverable in private litigation.") (Emphasis added.)

More importantly, punitive damages are "awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future." *Restatement (Second) of Torts*, § 908(1) (1979). *See also City of Newport* v. *Fact Concerts, Inc.*, ____ U.S. ____, 101 S.Ct. 2748, 2759, 69 L.Ed.2d 616 (June 26, 1981). Thus there is a deterrent or regulatory effect in punitive damages, which the trial judge explicitly recognized in the instant case. In jury instruction number 19 the court directed the jury that it "may give damages for the sake of example and by way of punishment," noting that punitive damages are allowed "both as a restraint upon the transgressor and as a warning and example to deter the commission of like offenses in the future." 485 F.Supp. at 603. In denying Kerr-McGee's motion for judgment n.o.v., the court mentioned the substantial evidence of poor training, poor security, and indifference to hazards. *Id.* at 591. The court's general treatment of the punitive damages issue clearly demonstrates its approval on the basis that Kerr-McGee so negligently and indifferently operated the plant that punitive damages were appropriate to punish

Kerr-McGee and to deter it and others from similar bad practices in the future.

The problem with awarding punitive damages in this case, however, is that *Northern States* read the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2284, particularly section 2021, as preempting state regulation of radiation hazards resulting from atomic energy development. The Supreme Court accepted the Eighth Circuit's conclusion that "Congress intended to pre-empt the field of the licensing and regulation of nuclear reactors to the exclusion of the states and . . . did not intend to provide for dual regulation of radiation hazards, even as to those activities which could be turned over to the states." 447 F.2d at 1151. *Northern States* traced the history of atomic energy development in the United States from a government monopoly through the congressional decision, effectuated in the Atomic Energy Act of 1954 with its subsequent modifications and additions, to encourage private industry to participate. Specifically, the decision held that Minnesota could not impose state licensing requirements to regulate radiation emissions from nuclear power plants in that state.

Other cases have recognized the strong federal interest in atomic energy development. In *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1, 17, 96 S.Ct. 1938, 1945, 48 L.Ed.2d 434 (1976), the Supreme Court appears to have reaffirmed its memorandum holding in *Northern States* by ruling that the Atomic Energy Commission (now NRC) has exclusive control over the discharge of nuclear materials. In *United States* v. *City of New York*, 463 F.Supp. 604 (S.D.N.Y. 1978), the court found that federal preemption precluded New York City from licensing nuclear reactors in the city. Although recently the Ninth Circuit upheld California's statutes requiring state approval of proposed nuclear plants and their locations within California, it recognized Congress's intent to assert exclusive federal control over radiation hazards associated with nuclear energy. *Pacific Legal Foundation* v.

State Energy Resources Conservation and Dev. Comm'n, Nos. 79-3365, 79-3382, 80-4265 & 80-4273 (9th Cir. Oct. 7, 1971).

Arguably there should be a strong presumption against preemption of state laws affecting such vital interests of its citizens as those involved in the instant case. However, the nuclear industry was initially developed by the federal government, is closely linked with national security, and is extensively regulated by a federal agency. This apparently is the basis upon which *Northern States* was decided. *See* Note, *A Framework of Preemption Analysis*, 88 Yale L.J. 363, 379-81 (1978). We cannot read that case and *Train* other than as requiring us to hold invalid any state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material. A judicial award of exemplary damages under state law as punishment for bad practices or to deter future practices involving exposure to radiation is no less intrusive than direct legislative acts of the state. Thus we hold punitive damages may not be awarded in this case.

It does not matter whether Kerr-McGee violated AEC regulations in the conduct of its plant operations. The AEC (NRC) has comprehensive powers to punish and prohibit practices it regards as improper, through its power and responsibility to license, 42 U.S.C. § 2131, investigate, *id.* § 2271, enjoin, *id.* § 2280, and seek civil and criminal penalties. *Id.* §§ 2272, 2273, 2282.

We need not consider other alleged errors asserted by Kerr-McGee in its appeal. The decision is affirmed in part and reversed in part and remanded to the district court for further considerations consistent herewith.

WILLIAM E. DOYLE, Circuit Judge, dissenting.

I disagree with most, but not all, of the points which are developed in the majority opinion. I disagree also with the result reached. I have no disagreement with the affirmance of the award of $5,000 to the estate of Karen Silkwood based upon destruction of her furniture and belongings.

I.

Alleged Exclusiveness of the Remedy of Workmen's Compensation

From the fact that the statute presumes in favor of the existence of a workmen's compensation remedy where an employee is injured and makes a claim, the majority opinion reaches the conclusion that this presumption is also available to the Company where the employee has not made a claim. No such suggestion is made in the statute. Authority in support of this position is either meagre or non-existent.

The first issue to be considered is whether the workers' compensation remedy is exclusive as a matter of law under the facts in the record. Kerr-McGee's position is that the evidence and the law call for liberal construction in favor of coverage and that, therefore, the exclusive remedy was that under workers' compensation. The cases say that the Act is not to be given a narrow, restricted meaning and must receive broad and liberal interpretation in order to realize its intent; reasonable doubt as to whether the injury arose out of and in the course of employment is to be resolved in favor of an injured workman. *City of Nichols Hills* v. *Hill*, 534 P.2d 931, 934 (Okl.1975); *Murphy* v. *Owens-Corning Fiberglas Corp.*, 447 F.Supp. 557, 571 (D. Kan. 1977), *aff'd*, 78-1082 (10th Cir. July 13, 1979).

Workers' Compensation as an Issue of Fact

Alternatively, however, Kerr-McGee maintains that it was entitled to have the workers' compensation issue submitted to the jury. The argument is that the trial court erred in refusing to instruct the jury on the subject of workers' compensation inasmuch as Oklahoma law provides for jury determination of the coverage question where the evidence is conflicting. The Oklahoma courts have held that, in a common law tort action where the worker's compensation defense is raised, the jury must be instructed on the defense unless as a matter of law only one inference can be drawn from the evidence: "where there is room for a reasonable difference of opinion as to the proper inference to be drawn from the known facts, the issue [of worker's compensation] is for the jury under proper instructions by the court." *Flick* v. *Crouch*, 434 P.2d 256 (Okl. 1967).

Oklahoma considers the question as one of fact for the jury where a question exists as to whether the injury occurred on the job or, on the other hand, away from the job.

Analysis of the Evidence

Three incidents in which Silkwood was shown to have had plutonium contamination are established by the evidence. The resulting inferences indicate that the sources of the contamination were both Silkwood's apartment and the Kerr-McGee laboratory. Since neither place was an exclusive source, the issue qualified as a factual dispute.

The first of the three incidents occurred on November 5, 1974 at 1:20 p.m. when Silkwood reported for work. At 2:45 and 3:15, before and after taking a break, Silkwood monitored herself with a plutonium detecting device provided by Kerr-McGee in accordance with the AEC requirements. No plutonium was detected on her person at that time. However, about 3:45 p.m. Silkwood began to

work in two glove boxes which contained plutonium. A glove box is a supposedly impervious box surrounding the plutonium processing equipment which has glove holes allowing the operator to work on the equipment with the plutonium from outside the box. When Silkwood monitored herself at 5:30 p.m. and 5:45 p.m., no contamination was detected. She continued to work in the glove boxes and upon withdrawing her hands from one of the boxes about 6:30 p.m. she did find contamination. Further checks were made in the laboratory and other contaminations were found, particularly inside the gloves and the glove box in which she had been working, polishing and containing plutonium. The contamination was found on Silkwood's left hand, right wrist, upper arm, neck, face, hair and in her nostrils. She was immediately decontaminated and placed on a five day voiding collection program, and was furnished with urine and fecal kits to take home for the purpose of obtaining samples which were to be sent to the United States Testing Laboratory for analysis. She monitored herself at 1:10 a.m. and found no contamination. The glove box was later tested by AEC investigators and no leaks were found. The investigators found no significant airborne contamination in the laboratory.

The *second* of the three incidents occurred on November 6, 1974. Silkwood arrived at work that day at 7:50 a.m. and did some paperwork in the lab until 8:50 a.m. At that time, she left to attend a union meeting. Before leaving she tested herself and found contamination on her hands. Tests showed fixed contamination of her right forearm, face and neck. Her hands were then decontaminated. Since the other spots appeared to be fixed contamination, she was allowed to proceed to the union meeting. She returned to the health office at 4:30 p.m., where a slight contamination was found on her right forearm, neck and face and in her nostrils. Again she was decontaminated, and at her request her locker and auto were tested and found to be free of contamination. The described second

incident raises a question because she had not been working with plutonium on the 6th of November at all. She had been restricted to paperwork in the lab prior to going to the union meeting. When she was monitored, the tests showed that she was contaminated, but she apparently had no exposure within the plant which would have produced contamination. The logical inference is that this contamination occurred away from the plant.

The *third* incident of contamination occurred the next day, November 7th, 1974. This apparently occurred *away* from work, Silkwood went directly to the plant's health and physical office when she reported to work. There she was found to be contaminated in her nostrils and on her hands, her arms, chest, back, neck and right ear. Four urine samples and one fecal sample collected on or after November 4th were found to be contaminated, although the exterior of the kits showed no contamination. It was stipulated by the parties that urine samples brought to the plant had been spiked with plutonium, that is, they contained insoluble, non-naturally excreted plutonium. Here again the positive evidence was that the exposure occurred in her apartment.

It was after this that Silkwood's apartment was found to have been contaminated. The highest concentration of plutonium were found in the bathroom and on a package of bologna and cheese in the refrigerator. It could be inferred that the contamination from the first incident occurred within the plant. This was the day that she was working inside the glove boxes. On the second day, however, she had been performing paperwork in the lab until 8:50 a.m., at which time she left to attend a union meeting. Before leaving she tested herself and found contamination on her hands, etc. We noted above that she had had no exposure within the plant which would have produced contamination, with the possible exception of the papers that she was working with.

The third contamination incident obviously occurred away from the plant and presumably at her home because she went directly to the physical health office when she reported for work and was found to be contaminated in her nostrils, on her hands, arms, chest, back, neck and right ear. This was the day, too, that she presented urine samples spiked with plutonium.

The majority opinion concludes that the inference to be drawn is that all of the plutonium contamination occurred at the plant. This, however, ignores the fact that there is substantial evidence showing that contamination occurred off the premises, in her apartment, and indeed this evidence jibes with the evidence that the apartment itself was substantially contaminated.

A good deal of evidence was offered which was designed to show that Kerr-McGee had a motive for intentionally exposing her to contamination. She was not popular in the plant among the loyal employees. This was due to the work that she was shown to have been engaged in, her evidence gathering activities, and her efforts to show that plutonium was escaping from the plant.

Following Silkwood's death, the autopsy revealed that the amount of plutonium within her body at the time of her death was between 25% and 50% of the permissible lifetime body burden allowed by the AEC for plutonium workers. From her body condition and from the contamination that was found in her apartment, together with the evidence of her personal contamination, the logical inference is that the contamination took place outside the plant.

Defendants' theory of the case was, of course, that all of the contamination originated on the premises of the company. On the other hand, the plaintiff's theory of the case was that all exposure originated in Silkwood's apartment. The evidence is susceptible to either conclusion. In the face of such conflicting evidence, the question should go to the jury (as Kerr-McGee has requested alterna-

tively). It was error for the majority to ignore the disputed facts and to hold that all the inferences favored the conclusion that contamination had been suffered on the premises of Kerr-McGee. Submission to a jury of twelve would have been the fair and conclusive way to solve this conflict.

II

Allowance of Property Damages

In allowing the award of property damages to the plaintiffs, the majority distinguishes between *personal injury*, which it holds to be subject to workers' compensation, and property damage, which is not so recoverable. Kerr-McGee argues, however, that its substantial compliance with preemptive federal regulations is conclusive evidence of due care and precludes recovery under a strict liability standard applicable to a private civil action. The fact that the federal government did not find fault on Kerr-McGee's part does not provide full and pervasive immunity.

The $5,000 *property damage* award, is not regarded by the majority as a remedy which would significantly interfere with federal regulations of Kerr-McGee's plant. I agree.

Furthermore, the majority says that the AEC has not been authorized to provide compensatory award for property or other losses to a victim of a nuclear injury unless the injury falls within the Price-Anderson Act, which is intended to compensate victims of a widespread nuclear catastrophe. In further discussion, the majority notes that the Supreme Court, and Congress also, have recognized that state tort law principles continue to be applicable to some extent in off-site damage cases. In *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978), the Supreme Court noted that the right to utilize common-law remedies *"at least with regard to nuclear accidents* was replaced by the com-

pensation mechanism of the statute." 438 U.S. at 88, n.33, 98 S.Ct. at 2638 n.33. This statement clearly implies that such remedies remain intact in cases which do not involve a nuclear accident.

In enacting the Price-Anderson Act, 71 Stat. 576 (1957), 42 U.S.C., Congress sought to address the problem likely to result from nuclear *disasters* which might deter the industrial development of nuclear energy. The Act requires nuclear energy companies to take out insurance in order to protect against these extraordinary nuclear occurrences. In respect to nuclear incidents below the level of the extraordinary cases, *i.e.*, cases like the present controversy which is conceded to be a lesser incident, private tort actions arising under state common law are to be used. Indeed, the congressional commentary expresses this interest.

The majority also concedes that strict liability is a theory which is to be pursued in this area, and that Oklahoma would apply strict liability to the escape of plutonium, a highly toxic and dangerous substance. *Young* v. *Darter*, 363 P.2d 829 (Okl. 1961) (herbicide spray); *Kirkland* v. *General Motors Corp.*, 521 P.2d 1353 (Okl. 1974). Thus, the majority recognizes that nuclear energy is an area in which no court is likely to refuse to recognize the applicability of strict liability. Restatement of Torts, Second, § 520, Comment g (1977). The very essence of liability without fault is, of course, the carrying on of ultrahazardous activity, that which exposes to an abnormal risk. In conducting this kind of activity, it is foreseeable that serious injury will occur irrespective of fault. The risk is of such great magnitude that the activity is ultrahazardous, such that the person carrying on the activity is liable regardless of fault.

This then was the rationale of the majority for affirming the award of $5,000 property damages. As noted at the outset, we do not dispute this conclusion.

The jury also found that Silkwood did not intentionally or wilfully remove plutonium from the plant. All of the plutonium was conceded to have originated on the Kerr-McGee premises.

III

Does the Atomic Energy Act of 1954 Impliedly Preempt That Part of the State Remedy Which Authorizes Punitive Damages?

It is recognized in the majority opinion that nowhere in the Price-Anderson Act is there any mention of punitive damages. It is admitted, however, that mention in the Price-Anderson Act that state law may determine tort liability is susceptible to being read to permit punitive as well as compensatory damages in states like Oklahoma which permit them. The opinion considers important the fact that with regard to extraordinary nuclear occurrences (governed by Price-Anderson), provision is made for compensatory damages only. But we are not here dealing with that kind of a catastrophe nor with the Price-Anderson Act. Hence, the silence of the Price-Anderson Act is not probative. The question here is whether the Atomic Energy Act, 42 U.S.C. § 2011, *et seq.*, as construed in *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd, Mem.*, 405 U.S. 1035, 92 S.Ct. 1307, 31 L.Ed.2d 576 (1972), impliedly preempts part of the Oklahoma common law remedy.

The state was precluded as a result of the decision in *Northern States Power Co.* from undertaking the scheme of regulation of atomic energy which was then being carried out by the N.R.C. pursuant to the Atomic Energy Act. It is one thing to preempt the area which the federal government has undertaken to license and regulate; it is another for a court to read into the Act an intent to preempt a form of damages which would otherwise be a part of an isolated private lawsuit. This conclusion is particu-

larly apt where no evidence exists either on the face of the Act or otherwise of an implied purpose to so preempt by the Congress.[1] Indeed, the fact that private lawsuits are tolerated without any limitations argues against the majority position.

The general approach to preemption of state authority is shown in Constitutional Law Cases and Materials by Professor Gerald Gunther, athed. (1975). Professor Gunther states:

> When Congress exercises a granted power the federal legislation may displace state law under the supremacy clause of Article VI. *But Congress does not typically act on a wholesale basis, and congressional entry into a field does not necessarily end all state authority.* (emphasis added). *Id.* at 357.

What the author is saying is that preemption is not readily implied. Hart and Wechsler, *The Federal Courts and the Federal System*, 2nd. ed. (1973) is cited as being in accord with this position. The authors state at pp. 470-471:

> Federal law is generally interstitial in nature. It rarely occupies a legal field completely * * *. Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.

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[1] The fact that Congress has expressly excepted the private tort action without restriction argues against any implied intent to preempt a part of such action.

Professor Gunther points out that the problem is one of statutory interpretation. He further states that:

> [S]tate regulation falls not because of the commerce clause but because, under the supremacy clause of Art. VI, the "supreme" congressional law supersedes state law. Constitutional Law at 357.

He goes on to say that:

> [P]reemption occurs not only when there is an outright conflict between the federal scheme and the state requirement. State authority is barred as well when congressional action is an *implicit* barrier: when state regulation would interfere unduly with the accomplishment of congressional objectives. Determination of congressional requirements and purposes must start of course with the congressional statute itself, and the cases accordingly require particularized examination of the specific regulatory scheme. *Id.*

In this case, unlike the other preemption cases, there are no competing regulatory schemes.

There is a shortage of case authority which even considers the issue as to whether a civil action or some phase of it (as in this case) is subject to preemption under Article VI of the Constitution. Our search has uncovered a few decisions which have involved state suits. None of these have accepted preemption as being the dispositive formula.[2]

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[2] *Bramer* v. *United States*, 595 F.2d 1141 (9th Cir. 1979), a tort claims action by a serviceman for a radiation related injury. The Ninth Circuit found that preemption was not an issue except where Congress had expressly or impliedly provided for the supremacy of federal law. *Id.* at 1144, n. 7.

Rogers v. *Ray Gardner Flying Service, Inc.*, 435 F.2d 1389 (5th Cir. 1970), *cert. denied*, 401 U.S. 1010, 91 S.Ct. 1255, 28 L.Ed.2d 546

The Eighth Circuit's opinion in *Northern States Power Co.* (affirmed by the Supreme Court) is a very sound opinion. By showing how the doctrine of preemption operates, it provides a contrast to this case and shows the inadequacy of the preemption showing here.

The Supreme Court's decision in *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963) has some relevance in that it shows

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[2](Continued)

(1971), was a wrongful death action arising out of a private airplane crash in Oklahoma. The Fifth Circuit ruled that a Federal Aviation Act agency provision did not preempt an Oklahoma bailment law. Congress held not to have expressly preempted the field; tort law said to have been historically left to the states. *Id.* at 1393-94. Oklahoma law found to preclude liability (on other grounds).

In *Smith* v. *Cessna Aircraft Corp.*, 428 F.Supp. 1285 (N.D.Ill.1977) no preemption by federal law of state law in a plane crash case. Illinois had held that federal contribution laws preempted state law in a major aircrash case because of "the predominant, indeed almost exclusive, interest of the federal government in regulating affairs of the nation's airways." The court recognized that there was considerable congressional "opposition to interference with traditional state tort law." 428 F.Supp. at 1287. It was concluded that the case presented no necessity for preemption by federal law.

Southern Pacific Transportation Co. v. *United States*, 462 F.Supp. 1193 (E.D.Cal.1978), a railroad suit against the United States for damages caused by a shipment of bombs. The railroad urged that state law was preempted because of federal regulations pertaining to the shipment of bulked goods on railroads. Held: no preemption, since many ICC regulations cited by the railroad had little or nothing to do with the accident. 462 F.Supp. 1223-27.

Harper and Row Publishers, Inc. v. *Nation Enterprises*, 501 F.Supp. 848 (S.D.N.Y.1980) was a copyright action. The court found there that the plaintiff's state law claims were preempted by the federal Copyright Act. The case is noteworthy because it emphasized the importance of a specific express declaration of preemption by Congress.

reluctance to exercise preemption. There a California statute

> barred avocados which did not meet the state's minimum oil content standard of maturity. Federal marketing orders issued pursuant to the Agricultural Adjustment Act gauged the maturity of Florida avocados by standards other than oil content.

Thus, the state was seeking to regulate the same subject matter which federal regulations addressed in seeking to solve the same problem. Notwithstanding the conflict the Supreme Court held:

> that the supremacy clause did not prohibit California from excluding Florida avocados certified as mature under the federal regulations but which contained less than the minimum California oil content.

The majority opinion concluded that there was not an actual conflict between the two schemes of regulation and that both could live, one with the other. It was said in that case that there was no evidence of a congressional design to preempt the field; that there was no physical impossibility in complying with both standards. The maturity of avocados seemed to be an inherently unlikely candidate for exclusive federal regulation; the federal regulation there in issue which set minimum standards for agricultural commodities, even though comprehensive, did not in and of itself show implied displacement of state control over distribution and sale of those commodities in the interest of the consumers of the commodities within the state. The opinion finally said that the Court was unable to find an unambiguous congressional mandate to exclude state regulation. The federal law involved concerned minimum rather than uniform standards. The statutory scheme was one of regulating maturity, and was drafted and administered locally by the growers' own representatives and was designed to do more than promote orderly competition among the South Florida growers. The dissenting opinion saw the federal scheme as a comprehensive

regulatory program and the California scheme as identical in structure to the federal one. They said that the question was purely an economic one.

Why is the *Florida Lime and Avocado Growers* case helpful here? It shows the Supreme Court's tendency to refrain from declaring implied preemption whereby a state law is displaced by a federal one.

All of the decided cases tend to reveal the inherent weakness on the preemption question of the majority position. A holding that preemption is present here is a gross infringement of state prerogatives as well as the rights of individual citizens.

* * * *

In the case before us, neither express preemption nor implied preemption is appropriate. Nor does the fact situation as a whole suggest applicability of the preemption doctrine. The simple reason is that it is not needed and would be superfluous.

IV

The Lack of Authoritative Cases in Support of Preemption as Here Presented

The majority seeks to support its preemption of punitive damages position with the decision in *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143 (8th Cir.), *aff'd mem.* 405 U.S. 1035, 92 S.Ct. 1307, 31 L.Ed.2d 576 (1972). It also cites *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 96 S.Ct. 1938, 48 L.Ed.2d 434 (1976), but does not emphasize that case. The majority opinion states that: "Imposing a state tort law rule of strict liability for nuclear-related property damage * * * might in some instances encroach upon federal regulations setting effluent or other standards." Thus, it "might" encroach in some instances.

The above does not say that it does encroach. It merely speaks of possible encroachment; the majority does not say

that encroachment is present. The majority concludes that imposition of tort liability in this case will significantly interfere with federal regulation. This latter conclusion suggests that preemption is to be decided on a case to case basis. Clearly it is not. The federal government has either preempted or it has not.

So far the majority is speaking of tort liability. It now turns to exemplary damages.

From the *Northern States* holding that the field of licensing and regulation has been preempted, it is contended that exemplary damages, due to their punishment aspect, cannot be awarded. But a tort action is a far cry from a regulatory system. The fact that Minnesota is precluded from this governmental activity falls short of dictating that exemplary damages have to be barred.

If a tort action does not interfere, the award of exemplary damages cannot impede federal government regulation. After all, the award of a large amount of actual damages can be equally punishing. It is the money which causes the suffering, not the designation.

The Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2284, preempts the field of nuclear licensing and regulation. But until now, no effort has been made to abolish damages in a private civil action. No collision exists nor is one possible between the simple state law inspired tort action and the federal government. To say that preemption prevents the imposition of exemplary damages in connection with a civil judgment carries the preemption concept far beyond anything that could have been intended or could ever be implied. The decision in the *Northern States* case was, as conceded by the majority, that Minnesota could not impose state licensing and regulation on Minnesota power plants in the face of a similar federal regulation scheme. This is unquestioned preemption.

Also in *Northern States*, it was made clear from a study of the congressional history that the intent of the

Act was to preempt regulatory licensing authority. It was the licensing and regulation of more dangerous activities which was preempted by the federal government. The Joint Report of the Congress declared that it was intended to leave no room for the exercise of dual or current jurisdiction by states to control radiation hazards by regulating by-product source or special nuclear materials. 447 F.2d at 1151.

> The intent is to have the material regulated and licensed either by the Commission, or by the state and local governments, but not by both. The bill is intended to encourage states to increase their knowledge and capacities and to enter into agreements to assume regulatory responsibilities over such materials.

Thus, it was special hazards which the federal government retained for its responsibility. These included the construction and operation of production utilization facilities, including reactors. It was pointed out that:

> Subsection k provides that nothing in the new section 274 shall be construed to affect the authority of any state or local agency to regulate activities for purposes other than protection against radiation hazards. This subsection is intended to make it clear that the bill does not impair the state authority to regulate activities of AEC licensees for the manifold health, safety and economic purposes other than radiation protection. As indicated elsewhere, the Commission has exclusive authority to regulate for protection against radiation hazards until such time as the state enters into an agreement with the Commission to assume such responsibility.

The analysis by the *Northern* court brings out the concern of the Congress as to possible dual federal-state control, a concern which could not exist here.

• • • •

In closing, I have some views regarding the large amount of the exemplary damages awarded by the jury.

However, there is no need to consider this problem here at this time since the amount of reduction is not an issue. At the present writing, at least, the cause appears to be a lost one.

Finally, it is helpful to review some of the governing criteria. These are summarized by the Supreme Court in *Hines* v. *Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941). The state law there at issue required that certain aliens register as such and carry a card. The Supreme Court held that the subject of registration of aliens, because of its national and international nature, was preempted by the national government and that the power of the state was not concurrent.

The Court said in speaking of a formula:

> There is not — and from the very nature of the problem there cannot be — any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This court * * * has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. * * * * In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances * * * * Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Id.* at 67, 61 S.Ct. 404.

Applying the Supreme Court's test in *Hines*, the conclusion would certainly be the preemption does not apply in this case, nor do any of the other suggested expressions of Justice Black apply to our problem.

We conclude that there is no justification whatsoever based on precedent, history, policy or reason which justifies a holding that preemption applies to the present problem.

NOVEMBER TERM — February 19, 1982

Before Honorable Oliver Seth, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges.

BILL M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, deceased, Plaintiff-Appellee,	)	
v.	)	No. 79-1894
THE KERR-McGEE CORPORATION, a Delaware corporation, and KERR-McGEE NUCLEAR CORPORATION, a Delaware corporation, Defendants-Appellants.	)	

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing in banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted. Judge Doyle voted to grant rehearing.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and the Court having been polled on the suggestion for rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, rehearing en banc is denied. Circuit Judges Barrett and Doyle voted to grant rehearing en banc. Circuit Judge Holloway is recused, and took no part in this matter.

(s) *Howard K. Phillips*
HOWARD K. PHILLIPS, Clerk

Office - Supreme Court, U.S.
FILED
MAY 20 1982
ALEXANDER L. STEVAS,
CLERK

81-2159

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1981

BILL M. SILKWOOD, Administrator of the Estate of KAREN G. SILKWOOD, Deceased,
Appellant,

VERSUS

THE KERR-McGEE CORPORATION,
a Delaware Corporation, and
THE KERR-McGEE NUCLEAR CORPORATION,
a Delaware Corporation,
Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

APPENDIX TO JURISDICTIONAL STATEMENT PART II

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[APPENDIX]

[Filed August 16, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

BILL M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, deceased,	)	
Plaintiff,	)	CIV-76-0888-Theis*
vs	)	
KERR-McGEE CORPORATION, ET AL., Defendants.	)	

Daniel P. Sheehan, Arthur R. Angel, Jim Ikard, Oklahoma City, Okl., G. L. Spence, Spence, Moriarity & Schuster, Jackson Hole, Wyo., for plaintiff.

William G. Paul, L. E. Stringer, John J. Griffin, Jr., Crowe, Dunlevy, Thweatt, Swinford, Johnson & Burdick, Oklahoma City, Okl., and Elliott C. Fenton, Larry D. Ottaway, Fenton, Fenton, Smith, Renteau & Moon, Oklahoma City, Okl., Glenn W. McGee, C. Lee Cook, Jr., Chadwell, Kayser, Ruggies, McGee & Hastings, Chicago, Ill., for defendants.

OPINION AND ORDER OVERRULING DEFENDANTS' POST-TRIAL MOTIONS

THEIS, Chief Judge.

This is a personal injury action for damages caused through exposure to radiation suffered by plaintiff's decedent as a consequence of plutonium escaping a nuclear fuel processing plant operated by defendants. A lengthy jury trial culminated May 18, 1979, in a jury's answers to interrogatories finding actual damages of $505,000.00 and

* Theis, Chief Judge of the District of Kansas, sitting by designation of the Tenth Circuit Court of Appeals as a judge of the Western District of Oklahoma.

punitive damages of $10,000,000.00. The jury's answers also indicated liability of both defendants on strict liability and also on the basis of defendants' negligence. The Court accepted the verdict and on June 21, 1979, entered judgment in accordance therewith.

This matter now comes before the Court on defendants' alternative motions for judgment notwithstanding the verdict or for a new trial. Twenty-two separate grounds are alleged to support these motions. For the reasons stated herein, the Court finds these motions without merit and denies defendants their requested relief.

From the date this lawsuit was filed a dramatic divergence of perspective has existed regarding what the issues in this case are, how those issues arise in this suit, and the applicable legal standards that control their resolution. This manifest, often emotionally-charged disagreement has survived the pretrial and trial stages of the litigation, causing numerous heated objections over otherwise elementary rulings on discovery questions, admission of evidence, content of jury instructions, and the propriety of any determination of defendants' liability for damages, especially in the instant amounts. This disagreement has once again made itself apparent in the post-trial motions of defendants.

Because defendants' misconception of the legal issues presented in this case permeates many aspects of the post-trial motions before the Court, the Court must make certain prefatory remarks, even though this litigation is in its most advanced stages. These remarks may put in better perspective the true import of this Court's many evidentary rulings and the instructions given the jury, and may help illuminate several aspects of defendants' arguments otherwise not readily apparent. It is of singular importance for this Court to emphasize clearly what defendants argue and the legal theories upon which these arguments are premised.

From the outset of this litigation, defendants' perception of the basis upon which this lawsuit was brought has

differed from the narrow issues presented in the pleadings. This was a personal injury action for damages caused through escape of plutonium from defendants' facility. This was not an intentional tort case. In defendants' strenuous and lucid arguments on these motions, counsel repeatedly stated that the trial of this action utterly failed to address "what this case was supposed to be all about" — to establish how plutonium came to be in Karen Silkwood's apartment. This Court simply does not agree.

In this case plaintiff sought to establish that culpable conduct of defendants permitted plutonium to escape from the Cimarron nuclear fuel reprocessing facility operated by defendants, and that this plutonium caused injury to Silkwood. How plutonium, once outside the plant, came into Silkwood's apartment is an issue quite distinct from how it escaped the facility.

Implicit in virtually all defendants' arguments in these motions is the suggestion that plaintiff ought not to recover unless he can demonstrate that an agent of Kerr-McGee actually deposited plutonium in Silkwood's apartment. The Court is well aware of the public speculation that has surrounded the facts of this case and the various theories of covert conspiracies advanced to explain intentional conduct that brought plutonium into Silkwood's apartment. Neither public speculation nor charges of conspiracy or intentional contamination, however, formed any part of plaintiff's claim in this trial. The sole issue before this jury was whether defendants were responsible or liable for the plutonium's escape and whether Silkwood was injured as a result of that escape. This Court ruled that defendants would be held strictly liable for any injury caused through escape of defendants' plutonium, unless, of course, defendants prevailed on their defense of assumption of the risk.

Defendants' resistance to this analysis of the case is predicated upon their contention that no liability may attach solely for the escape of plutonium from their facility

and for injury caused thereby. This freedom from responsibility for negligent or non-negligent acts that permit plutonium to escape into the public domain is premised upon the purported import of the appropriate federal regulations governing the facility's operation. Defendants also premise this argument upon a narrow theory of proximate causation, under which no liability exists unless a party caused the plutonium's movement physically into Silkwood's apartment.

Defendants have here claimed that they have no common law duty to contain plutonium within the walls of their facility and thus cannot be held liable merely for permitting plutonium to escape. Defendants contend that Congress has occupied the field of nuclear regulation through its legislation in the area. Unless defendants' conduct violates appropriate federal standards, or unless defendants may be held liable under federal law, they may not be held accountable in this Court. Imposition of liability on state common law principles represents the imposition of state standards where the federal government has not deemed them necessary. Federal preemption allegedly bars application of state law liability principles. Thus, defendants claim immunity from liability for any conduct for which the federal government does not impose liability.

Alternatively, defendants argue that they are subject to strict liability on state common law grounds only where they have failed to comply with federal regulations or with their AEC license requirements. Thus, if defendants have complied with all federal regulations, they cannot be held liable for any damages caused by the operation of their facility. Plaintiff has the burden of proving defendants' license noncompliance and in cases where no specific act or regulatory violation can be affirmatively established as the cause of injury, liability would not attach, unless the doctrine of res ipsa loquitur were applicable. This argument, of course, would essentially render nugatory the application of strict liability principles.

Both arguments presume much about the nature of the federal regulation of nuclear facilities. The primary issue in this case is whether defendants may be held liable for the escape of plutonium into the public domain on state strict liability grounds or on ordinary principles of negligence. Although defendants contend that they may not be legally held accountable under state law for the instant damages, defendants have failed to note any federal law which creates a private cause of action for violations of federal regulations. Defendants do not address any statutory or regulatory provisions, or the history to the federal legislation, to support their view.

Indeed, even cursory analysis of federal law clearly establishes that Congress specifically intended that state common law principles control nuclear accident litigation. Common law duties to act with all due care exist both in the absence of specific regulatory provisions and in conjunction with the federal guidelines for operation of nuclear facilities. It is also abundantly clear that Congress specifically intended that states apply strict liability principles, if available under state law, to liability determinations. Defendants' theory of preemption is simply unsupported by law.

APPLICABILITY OF STATE COMMON LAW STRICT LIABILITY PRINCIPLES

Defendants argue in their brief and oral argument three or four basic propositions regarding federal preemption and the role of federal regulations. First, federal preemption allegedly prohibits inposition of liability except in accordance with federal law. Thus, strict liability may not be imposed unless federal law — the Price-Anderson Act — requires it. Defendants have orally argued and suggested in their brief that no liability may attach at all unless defendants have failed to comply with federal law and regulations that control their conduct. Secondly, defendants maintain that they cannot be held liable for any damages

whenever a plaintiff's exposure is within the maximum permissible exposure limits set by the Atomic Energy Commission ("AEC"(or the Nuclear Regulatory Commission ("NRC"). Third, defendants contend that substantial compliance with federal regulations bars any award of punitive damages and that the Court erred in failing to so instruct. These arguments all rest on the significance and effect of the federal Atomic Energy Act of 1954, the Price-Anderson Act, and the regulations issued pursuant thereto. A brief background is warranted.

The federal government originally reserved to itself an absolute monopoly on the development of atomic power in the Atomic Energy Act of 1946. Act of August 1, 1946, ch. 724, § 2, 60 Stat. 755. A movement developed, however, to permit private enterprise to enter the technonogical field. These efforts culminated in the enactment of the Atomic Energy Act of 1954, which abolished the governmental monopoly over nuclear technology and allowed private operation of nuclear reactors under strict AEC supervision. Act of August 30, 1954, ch. 1073, 68 Stat. 919, as amended, 42 U.S.C. §§ 2011-2281 (1970).

The concern over cost-disincentives to investment, particularly the availability and cost of liability insurance to cover major nuclear accidents, led to legislation in 1956 that provided for governmental indemnification against loss incurred through a nuclear accident. This bill was ultimately enacted in 1957 as the Price-Anderson Act. Act of September 2, 1957, Pub.L.No. 85-256, 71 Stat. 576, *codified at* 42 U.S.C. § 2210 (1970); *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98 S.Ct. 2620, 2625-26, 57 L.Ed.2d 595 (1978); see generally, Note, *The "Extraordinary Nuclear Occurrence" Threshold and Uncompensated Injury Under The Price-Anderson Act*, 6 Rutgers-Cam.L.J. 360, 362-64 (1974). Originally effective for only ten years, the Price-Anderson Act has since been twice extended and is now effective until 1987. Act of October 13, 1966. Pub.L. No. 89-645, 80 Stat. 891; Act of December 31, 1975, Pub.L. No. 94-197, § 4, 89 Stat. 1111.

Defendants contend that this federal legislation has occupied the field and prohibits imposition of liability except where federal law expressly so provides. Defendants have further orally argued that Congress never intended that state rules of strict liability be applied to actions for personal injury arising out of federally licensed nuclear facility operations. These statements are so palpably contrary to the legislative history of these acts that they hardly warrant serious argument.

Prior to the enactment of the Price-Anderson Act in 1957, Congress intended that *all* questions of liability for radiation injuries be submitted for determination under state tort law. The Supreme Court stated in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, supra, 98 S.Ct. at 2639 n. 33:

> "Appellees' only relevant right prior to the enactment of the Price-Anderson Act was to utilize their existing common-law and state-law remedies to vindicate any particular harm visited on them from whatever sources."

Chairman Anderson of the Joint Committee on Atomic Energy spoke during the 1975 hearings on the need for renewal of the Price-Anderson provisions. He stated that without Price-Anderosn's requirement that state common law defenses to liability be waived.

> "[e]stablishing liability would depend in each case on state tort law and procedures, and these might or might not provide for no-fault liability."

Hearings on H.R. 8631 before the Joint Comm. on Atomic Energy, 94th Cong., 1st Sess., 69(1975), *quoted in Duke Power Co.*, supra, 98 S.Ct. at 2639.

The congressional reports issued in conjunction with the Price-Anderson Act stated that whether or not liability existed in any case was to be determined according to the applicable state law. S.Rep. No. 296, 85th Cong., 1st Sess., 9,

reprinted in [1957] U.S.Code Cong. & Admin. News at 1803, 1810; HR.. Rep. No. 435, 85th Cong., 1st Sess., 9 (1957). When Congress passed the first extension of Price-Anderson in 1966, it similarly indicated that state law would control liability determinations. S.Rep. No. 1605, 89th Cong., 2d Sess., 3-4, 6-10, *reprinted in* [1966] U.S.Code Cong. & Admin. News at 3201, 3206-10. The AEC also agrees that liability determinations under Price-Anderson are made under applicable state law. *AEC Staff Study of the Price-Anderson Act: Part I*, 16 Atomic En.L.J. 205, 224 (1974).

Numerous commentators have unanimously concluded that Price-Anderson left the issue of liability determinations to state law. Comment, *Radiation and Preconception Injuries: Some Interesting Problems in Tort Law*, 28 S.W.L.J. 414, 427 (1974); Note, *The "Extraordinary Nuclear Occurrence" Threshold and Uncompensated Injury Under the Price-Anderson Act*, supra, at 364; Green, *Nuclear Power: Risk, Liability and Indemnity*, 71 Mich.L.Rev. 479, 496 (1973); England, *Nuclear Insurance and the Price-Anderson Act*, 13 Atomic En.L.J. 27, 33 (1971); Green, *Safety Determinations in Nuclear Power Licensing: A Critical View*, 42 Notre D.L. 633, 646 (1968); Cavers, *Improving Financial Protection of the Public Against the Hazards of Nuclear Power*, 77 Harv.L.Rev. 644, 648, 650 (1964); Estep and Adelman, *State Control of Radiation Hazards: An Intergovernmental Relations Problem*, 60 Mich.L.Rev. 41, 42 (1961); Comment, *Nuclear Liability Legislation in the United States and Europe*, 13 Stan.L.Rev. 865, 866 (1961); Note, *Recent Statutes*, 71 Harv.L.Rev. 750, 752 (1958).

Nor did the Price-Anderson Act mean to supplant the application of state tort liability to a nuclear accident of lesser magnitude which fails to qualify as an "extraordinary nuclear occurrence" within the terms of the Act. Recovery for a nuclear accident not covered by the Act was contemplated by Congress solely according to applicable state law, without the benefit of the Act's provision for waiver of state defenses. S.Rep. No. 1605, 89th Cong., 2d Sess., 6-10, *re-*

printed in [1966] U.S.Code Cong. & Admin. News at 3206-08; see also Comment, *The Irradiated Plaintiff: Tort Recovery Outside Price-Anderson*, 6 Environ.L. 859, 861 (1976); Note, *The "Extraordinary Nuclear Occurrence" Threshold and Uncompensated Injury under the Price-Anderson Act*, supra, at 367 (1974).

In enacting Price-Anderson, Congress considered and rejected the adoption of a federal tort statute based on absolute liability for nuclear power. *Duke Power Co.*, supra, 98 S.Ct. at 2627; Comment, *Radiation and Preconception Injuries: Some Interesting Problems in Tort Law*, supra, at 427. Congress provided instead that in the event of a major nuclear accident, federal law would establish a waiver of defenses to state common law claims for damages. This approach was deemed preferable both for the sake of simplicity and to avoid complicated problems of tort law. Thus, Price-Anderson sought to deal only with certain problems in existing state law that impair the ability of radiation-injured plaintiffs to recover on state law. Price-Anderson "[left] undisturbed the remaining body of the law." S.Rep. No. 1605, 89th Cong., 2d Sess., 10, *reprinted in* [1966] U.S. Code Cong. & Admin. News at 3210.

Indeed, defendants impliedly concede that the federal government has not preempted from nuclear accident cases the applicability of state law liability principles. Although defendants fail to address the apparent disparity, they have vigorously argued that state workmen's compensation principles must control recovery in this case. Defendants contend that the instant facts fall within that state statute's provisions for determination of liability and damages, and that state law must therefore be applied.

This Court agrees that if the facts warrant it, state workmen's compensation law applies. S.Rep. No. 296, 85th Cong., 1st Sess., 18, *reprinted in* [1957] U.S.Code Cong. & Admin. News at 1819; see also, Hutton, *Workmen's Compensation and Radiation Injury*, 12 Vand.L.Rev. 145 (1958);

Finks, *Radiation Injuries Compensable Under Workmen's Compensation*, 41 B.U.L. Rev. 183 (1961); Estep and Allen, *Radiation Injuries and Time Limitations in Workmen's Compensation Cases*, 62 Mich.L.Rev. 259 (1963). Defendants argue further, however, that when a claim does not fit within state compensation law, it may not be brought on another appropriate state law ground — whether strict liability or negligence — because federal law has occupied the field and foreclosed the application of state law. This argument is curiously inconsistent, unexplained and not distinguished.

Defendants further contend that application of state common law strict liability principles to determine the question of their instant liability conflicts with the Price-Anderson Act and with the general purposes of the federal energy programs. Lest there be any confusion on this point, the Court must note that both Houses of Congress expressly preferred that state strict liability principles be used to resolve liability determination in such cases. In its report on the first amendment and extension of the Price-Anderson Act, the Senate stated:

> "The question whether courts should apply legal principles akin to those of strict liability in the event of a serious nuclear incident seems to the committee to be free from dispute. The existing Price-Anderson system rests on the assumption that such principles will be so applied. All who have testified before the Joint Committee during the past 2 years have agreed that such principles should apply in such a case."

S.Rep. No. 1605, 89th Cong., 2d Sess., 9, *reprinted in* [1966] U.S.Code Cong. & Admin.News at 3209; see also S.Rep. No. 296, 85th Cong., 1st Sess., 9, *reprinted in* [1957] U.S.Code Cong. & Admin.News at 1810.

Indeed, the Price-Anderson Act was enacted largely because of Congressional concern that certain states might not be willing to apply strict liability principles to claims

arising from nuclear incidents. By adopting the waiver provisions of Price-Anderson, Congress therefore directed that the equivalent of strict liability principles must be applied, at least in major nuclear accidents within the definition of "extraordinary nuclear occurrences" covered by the Act. See *Duke Power Co.*, supra, 98 S.Ct. at 2627, citing S.Rep. No. 1605, 89th Cong., 2d Sess., 6-10, *reprinted in* [1966] U.S.Code Cong. & Admin.News at 3201; Proposed Amendments to the Price-Anderson Act relating to Waiver of Defenses, *Hearings Before the Joint Comm. on Atomic Energy*, 89th Cong., 2d Sess., 5 (1966); *AEC Staff Study of the Price-Anderson Act: Part I*, 16 Atomic En.L.J. 205, 224 (1974).

It should come as no surprise that authorities commenting on the subject have concluded with virtual unanimity that strict liability would be applied to actions seeking recovery for radiation injuries caused by the operation of a nuclear facility. These authorities include the first major treatise written on the topic, a work cited and relied upon by defendants to support their own contention that federal legislation occupies the field and precludes imposition of "stricter standards" than those applied by the federal government. Stason, Estep, and Pierce, *Atoms and the Law*, at 637 (1959) ("it would seem that certain aspects of that [nuclear] industry will in all probability become subject to [strict liability's] financial burden").

Indeed, these authors hypothesized a situation where special nuclear materials escape from a nuclear fuel reprocessing plant without a chain reaction incident — a factual situation remarkably similar to the instant case. The authors suggested that case law in 1959 was inconclusive, but they speculated that because the incident involved nuclear material, a court might well impose the rule of strict liability. Id. at 702.

From the first year of private involvement in nuclear power to the present time, commentators have similarly concluded that the application of strict liability to these

facts is both justified and to be anticipated. Becker and Huard, *Tort Liability and the Atomic Energy Industry*, 44 Geo.L.Rev. 58, 68 (1955) ("Quite conclusively, under one guise or another, liability without fault for injuries caused by the escape of radiation will be imposed on the owner or operator of a nuclear reactor"); Cable and Early, *Torts and the Atom: The Problem of Insurance*, 45 Ky.L.J. 3, 20, 28 (1956) (generally assumed that strict liability will apply); Freedman, *Nuisance, Ultrahazardous Activities and the Atomic Reactor*, 30 Temp.L.Q. 77 (1957); Frampton, *Radiation Exposure — the Need for a National Policy*, 10 Stan.L.Rev. 7 (1957); Stason, *Tort Liability for Radiation Injuries*, 12 Vand.L.Rev. 93 (1958); Seavey, *Torts and Atoms*, 46 Cal.L.Rev. 3, 8 (1958); Comment, *Nuclear Liability Legislation in the United States and Europe*, 13 Stan. L.Rev. 865, 866 (1961) (little doubt that operator will be held strictly liable); Cavers, *Improving Financial Protection of the Public Against the Hazards of Nuclear Power*, 77 Harv.L.Rev. 644, 653, 664 (1964); England, *Nuclear Insurance and the Price-Anderson Act*, 13 Atomic En.L.J. 27, 33 (1971) (Congressional proponents found it difficult to imagine strict liability would not be applied); Note, *The "Extraordinary Nuclear Occurrence" Threshold and Uncompensated Injury Under the Price-Anderson Act*, supra, at 370; Comment, *Nuclear Torts: The Price-Anderson Act and the Potential for Uncompensated Injury*, 11 N.Eng.L. Rev. 111, 120-22 (1975); Comment, *Radiation and Preconception Injuries: Some Interesting Problems in Tort Law*, 28 S.W.L.J. 414, 433 (1974); Comment, *The Irradiated Plaintiff: Tort Recovery Outside Price-Anderson*, 6 Environ.L. 859, 884 (1976); Comment, *The Plutonium Society: Deterrence and Inducement Factors*, 41 Alb.L.Rev. 251, 269 (1977) (strict liability "certainly applicable"); Prosser, *Law of Torts*, § 78 at 516 (4th ed. 1971); Harper and James, *Law of Torts*, at 812 (1st ed. 1956); Restatement (Second), *Torts*, § 520, com.g.h. (1976) (§ 519 strict liability for abnormally dangerous activities applicable to nuclear power), Cf. Keys and Howarth, *Approaches to Liability for Remote Causes:*

The Low Level Radiation Example, 56 IowaL.Rev. 531, 546 (1971) (whether strict liability applies to low level radiation injury not resolved).

Defendants also object to the application of strict liability in the instant case because the injured party was an occupational worker who "assumed the risk" of this type of injury. See Restatement (Second), Torts, § 523 (1976). It was uncontested in this case that Silkwood was contaminated at home in her apartment, an estimated twenty miles from the nuclear plant site. The jury was unable to find that Silkwood intentionally carried the plutonium from work to her apartment, and no evidence was introduced of any other way in which the contamination could have been work-related. As an occupational worker, Silkwood did not assume the risk of off-site contamination unrelated to her employment.

No authority supports this Court's excluding from application of strict liability workers who, during their private lives and away from their work, are exposed to radiation that coincidentally originates from their place of employment. Away from their employment these workers stand as any other member of the public. Kerr-McGee's argument that plaintiff had the burden of proving that the incident was not work-related overlooks the fact that this issue is an affirmative defense. The Restatement itself entitles § 523 "assumption of the risk," a defense that must be affirmatively pleaded and proved by defendants under federal rules. See Restatement (Second), Torts, § 523, com. a (1976); Rule 8, Federal Rules of Civil Procedure.

Defendants contend that the application of strict liability is in conflict with federal energy legislation unless imposed in a situation where defendants have failed to comply with federal regulations controlling the facility. It is important to understand the thrust of this argument. In essence, defendants here contend that except in the event of their noncompliance with federal regulations, they are

absolved from, and therefore immune against, any liability whatsoever for damages caused through their operation of a nuclear facility.

If defendants contend that without noncompliance, application of strict liability conflicts with federal policy, but that application of negligence principles does not, they draw a distinction without foundation in the law. Nowhere is authority cited or logic or reason adduced to support the idea that imposition of strict liability somehow is inconsistent with federal law, while the imposition of ordinary negligence to determine liability for the same conduct is not. This Court cannot discern any reason for such a distinction.

What defendants indirectly argue, of course, is that any determination of their liability — whether it be through application of state law principles of strict liability or negligence — is inconsistent with federal law unless defendants have violated a specific federal statutory or regulatory provision. This is made apparent in defendants' argument that their compliance with government regulation is conclusive evidence of non-negilgent conduct. Thus, absent noncompliance with federal regulations, liability could not be imposed on a negligence theory either.

This brings the Court to an analysis of defendants' contention that federal regulations alone control liability determinations, and that these defendants may not be held liable absent a showing of a regulatory violation. The import of the contention and the theory upon which it rests must be made clear. Proceeding by way of example may prove illuminating.

Defendants' evidence and arguments in the trial of this case demonstrated that federal regulation and regulatory guidelines would permit .5 grams of plutonium to escape their facility without detection, even assuming complete compliance with federal regulations and perfect operation of all detection equipment. Thus, a single worker who left

the facility building twice per day could remove without detection, 1 gram of plutonium per day, or 1 pound of plutonium over approximately 19 months. Two workers could achieve the same result in less than a year. Regulations controlling inventory difference would permit this facility to have approximately nine or ten pounds of plutonium unaccounted for, so loss of this one pound could easily go unnoticed. A Kerr-McGee witness characterized the implications of this 1 pound of plutonium in the public domain as "sheer havoc and death." Even the potentially very grave dangers of one half gram of plutonium in the public domain were agreed upon by virtually all witnesses. For this "sheer havoc and death" Kerr-McGee would claim freedom from responsibility and liability because of federal preemption. Congress, of course, intended no such thing.

As noted above, Congress clearly and indisputably indicated in its consideration of the Price-Anderson Act that state law would govern liability determinations for nuclear accidents in all actions. This was true whether or not the indemnification and waiver provisions of Price-Anderson were applicable, and whether state law would apply the strict liability principles under the Restatement of Torts, the strict liability principles of *Rylands* v. *Fletcher*, 3 H.&C. 774, 159 Eng.Rep. 737 (Ex. 1865), *rev'd*, L.R. 1 Ex. 263 (1866), *aff'd*, L.R. 3 H.L. 330 (1868), or ordinary principles of negligence. Quite simply, there is no preemption problem when Congress manifests its intent that state law play this specific role in the liability scheme.

The underlying thrust of defendants argument is that Congress intended these principles of state law to apply only if a violation of the federal regulations is first demonstrated. It is quite clear that Congress intended no such effect be afforded these administrative regulations, and the commentators have so agreed. Defendants' citation to preemption cases is inapposite where those cases deal with states that impose upon the nuclear licensee a standard of conduct that conflicts with the federal scheme and thus

frustrates its effectuation. Application of state principles of liability for injury caused by conduct both within and in violation of the regulatory standards is consistent with the federal scheme.

APPLICABILITY AND EFFECT OF GOVERNMENT REGULATIONS

Having decided that federal preemption does not bar imposition of liability under state law, the Court must address the effect of federal regulations on the judgment of defendants' conduct by the jury. As the Court understands their argument, defendants raise four separate contentions in this regard. For simplicity of exposition, it is helpful to separate the appropriate regulations and license requirements into two different groups — those relating to the conduct and operation of the facility, the "operational regulations," and those which set the maximum permissible exposure limits for different workers, the "exposure limit" regulations.

Defendants first have argued that substantial compliance with "operational regulations" bars recovery of actual damages, both because it prohibits imposition of strict liability, as discussed above, and because it is conclusive evidence of non-negligent conduct to bar a claim of ordinary negligence. Alternatively, defendants argue that substantial compliance with these operational guidelines must bar any award of punitive damages. Both arguments address whether liability may be imposed on defendants for operating their facility in such a way that plutonium might escape into the public domain. Defendants contend that when they do all that the government requires, they cannot be considered negligent and, *a fortiori*, cannot be found willfully reckless.

Defendants' arguments on the "exposure limit" regulations address the separate issue of whether damages may be imposed for the escape of plutonium in the instant case.

Defendants contend that a jury may not conclude that actual injury is inflicted for exposures below the 40 nanocurie limit for occupational workers, like Silkwood here. Alternatively, defendants argue that even if a jury finds that the instant exposure would create actual injury, a defendant may not be held liable in damages therefor because federal regulation permits it. Lastly, defendants argue that punitive damages ought not to be awardable for any conduct that has resulted in an exposure within the permissible guideline limits.

Had this Court instructed the jury that substantial compliance with governmental regulations would bar an award of actual damages in the area of nuclear power, the Court would have paved a new road in jurisprudence that heretofore has not existed in any other comparable area of the law. Liability for operators and manufacturers of aircraft represents a situation analogous to that in the instant case. The federal government has occupied the field of regulating aircraft, and no aircraft may fly in this country without a federal certification of its airworthiness. *In re Paris Air Crash of March 3, 1974*, 399 F.Supp. 732 (C.D.Cal. 1975). Nevertheless, strict liability is frequently applied under state law for injuries suffered thereby, and preemption is not considered a problem. See *In re Paris Air Crash of March 3, 1974*, supra. Actions for injuries allegedly caused by a defectively designed aircraft are not barred by reason of the FAA's certification of the craft and of its design as airworthy. See *Rigby* v. *Beech Aircraft Co.*, 548 F.2d 288 (10th Cir. 1977).

It is commonly the rule in the field of aviation law that a defendant's complete compliance with governmental safety regulations is only some evidence of the defendant's exercise of reasonable care, but it is not conclusive. Evidence of compliance is therefore admissible for consideration by the jury, but it does not bind the jury to find that a defendant's conduct was reasonable under the circumstances. *Bruce* v. *Martin-Marietta Corp.*, 544 F.2d 442, 446

(10th Cir. 1976); see also *Banko* v. *Continental Motors Corp.*, 373 F.2d 314 (4th Cir. 1966); *Prashker* v. *Beech Aircraft Corp.*, 258 F.2d 602, 605 (3rd Cir. 1958); *Citrola* v. *Eastern Air Lines, Inc.*, 264 F.2d 815, 817 (2d Cir. 1959); *Manos* v. *Trans World Airlines, Inc.*, 324 F.Supp. 470 (N.D.Ill.1971).

In a similar vein, a failure to take certain acts can be found negligent, even though the FAA regulations do not require or suggest them. *Bibler* v. *Young*, 492 F.2d 1351 (6th Cir. 1974); *Todd* v. *United States*, 384 F.Supp. 1284, 1291 (M.D.Fla.1975) (standard of reasonable care may differ from conduct imposed by safety regulation). Notwithstanding the "complex and exacting scheme of regulation[s] developed by the FAA," there is no problem of federal preemption when courts develop rules of liability and damages where the high standard of conduct consistent with the regulatory scheme has not been maintained. See *Fisher* v. *Bell Helicopter Co.*, 403 F.Supp. 1165, 1172 (D.D.C.1975). Violation of a safety regulation is, however, conclusive evidence of negligence per se. *Freeman* v. *United States*, 509 F.2d 626, 630 (6th Cir. 1975); *Todd* v. *United States*, supra.

The same principles obtain in the field of drug manufacture and distribution, another field where a governmental agency has promulgated a vast and extensive network of administrative regulations designed to insure public safety. It is typically, the rule that compliance with federal laws and regulations concerning a drug does not in itself absolve a manufacturer of liability for injury caused by that drug. *Salmon* v. *Parke Davis & Co.*, 520 F.2d 1359 (4th Cir. 1975), *citing*, 1 Frumer & Friedman, *Products Liability*, § 8.07[1]. A defendant's compliance with these government regulations is admissible before the jury as some evidence of the exercise of reasonable care, but it is not conclusive or binding on the jury. *Brick* v. *Barnes-Hines Pharmaceutical Co.*, 428 F.Supp. 496, 498 (D.D.C.1977); *Chambers* v. *G. D. Searle & Co.*, 441 F.Supp. 377, 383 (D.Md.1975) (compliance with FDA requirements on required warning not conclusive on adequacy of warning), *aff'd*, 567 F.2d 269 (4th

Cir. 1977); *Gonzales* v. *Virginia-Carolina Chemical Co.*, 239 F.Supp. 567, 575 (E.D.S.C.1965).

Thus, strict liability may be imposed on a defendant for failure to warn adequately even though full compliance with all government regulations and requirements in production and marketing is demonstrated. *Stromsodt* v. *Parke Davis & Co.*, 257 F.Supp. 991, 997 (D.N.D.1966) *aff'd*, 411 F.2d 1390 (8th Cir. 1969). See generally 1 Frumer & Friedman, *Products Liability*, § 5.04 (1979). Similarly, a manufacturer has been held liable for negligent failure to test a drug adequately under foreseeable market conditions even though federal regulations did not require any such test. A manufacturer cannot exempt itself from liability for failure to exercise due care in an area where no specific regulation requires the affirmative act. *Tinnerholm* v. *Parke, Davis & Co.*, 285 F.Supp. 432, 448 n. 12 (S.D.N.Y.1968), *citing* 3 Frumer & Friedman, *Products Liability*, § 33.01[3], *aff'd*, 411 F.2d 48 (2d Cir. 1969). The correlative rule is also applied that violation of a safety regulation constitutes conclusive proof of negligence per se. *Orthopedic Equipment Co.* v. *Eutsler*, 276 F.2d 455, 461 (4th Cir. 1960); *Griffin* v. *United States*, 351 F.Supp. 10 (E.D.Pa.1972); *Gonzales* v. *Virginia-Carolina Chemical Co.*, supra.

A recent author has commented on the issue of tort liability for microbiologists engaged in hazardous genetic mutation research under the auspices of the National Institute of Health, where strict containment of biological material is required. That writer has suggested that compliance with NIH guidelines should constitute strong evidence of non-negligent conduct in an action for injuries caused by the research. He further finds, however, that courts would likely not deem compliance entitled to a presumption of reasonable care. McGarity, *Book Review*, 27 Kan.L.Rev. 459, 466 (1979). No problems of preemption or application of a "stricter standard" under state law have been perceived in any of these areas.

Those writers who have addressed this subject in the field of nuclear facilities and radiation injuries have similarly concluded. Quoting again from the early treatise on this subject, the text writers stated:

> "[I]t seems to be agreed generally that proof of compliance with a criminal statutory or administrative standard should be accepted as some evidence of having used due care but that it ought not to be accepted as conclusive proof.
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> "The present writers feel that, in general compliance with governmental radiation regulations should be accepted in negligence cases as evidence of having acted reasonably but should not be used as conclusive proof because there are too many variables in such a rapidly developing field. We would apply this rule generally to civil statutory and administrative regulations as well as criminal."

Stason, Estep and Pierce, *Atoms and the Law*, 125, 126 (1959). Noting a New Jersey trial court decision with a different holding, the writers concluded that they were:

> "[i]nclined toward the view that proof of compliance with a safety code, whether established by unofficial experts in the field or by a statute or administrative rulings, should be treated merely as evidence of use of due care." Id. at 152.

The purpose of AEC regulations, and the posture of the government agency at the time of their promulgation, render it unwise to bestow upon these health and safety operational regulations an absolute deference as conduct reasonable under any circumstances. When the AEC initially undertook promulgation of health and safety regulations, the atomic industry was just beginning to develop. Thus, the AEC faced the unique problem of promulgating regulations in advance of the development of those problems it was intending to regulate. Additionally, a variety of dif-

ferent types of facilities existed with diverse safety and security problems, and the AEC was inexperienced in the regulation of any industrial activities. These factors made it unwise, and even impossible, for the AEC to devise a set of government rules that would cover all atomic activities. Trowbridge, *Licensing and Regulation of Private Atomic Energy Activities*, 34 Tex.L.Rev. 842, 843-51 (1956).

Sound logic supports the proposition that compliance with statutory and regulatory provisions does not necessarily lead to the inference that negligent conduct is not present.

> "[I]n a field developing as rapidly as atomic energy, particularly as to our knowledge of the injurious effect of radiation, it would be most unfortunate if statutes, administrative regulations, or decisional rules should develop hard and fast lines as to what is or is not a reasonable standard of conduct."

Stason, Estep, and Pierce, *Atoms and the Law*, supra, at 154.

This is especially true when the AEC itself acknowledges that these regulations are not static or final standards for reasonable care upon which the industry might absolutely rely without additional safety precautions. The agency itself originally recognized that atomic energy regulation would be a slow evolutionary process with an emphasis in agency regulations on encouraging private industry both to develop their own measure of self-regulation and to improve upon the standards imposed by the government. Trowbridge, *Licensing and Regulation of Private Atomic Energy Activities*, supra, at 843-51. The AEC originally announced its intention to rely on certain measures of protection that it expected industry itself to put into effect, even though the Atomic Energy Act authorized the AEC to describe in detail the required measures of protection. *Hearings on the Development, Growth and State of the Atomic Energy Industry before the Joint Comm. on Atomic Energy*, 84th Cong., 2d Sess., pt. 1 at 114-15 (1956).

The AEC still acknowledges that its regulations evolve with time and are established or modified as operational experience is gained in new plants and as further information is obtained from ongoing research and development programs. Nuclear Safety Staff, United States Atomic Energy Commission, *Regulation of Nuclear Power Reactors and Related Facilities*, 16 Atomic En.L.J. 256, 260 (1974). A Director of Regulations of the AEC has recently cited the need for continuing development of operational procedures at nuclear facilities. Muntzing, *Nuclear Standards — Licensing, Government and Industry*, 14 Atomic En.L.J. 14 (1972). Others have also noted the need for constantly improving regulations governing the handling of nuclear fuels and the AEC's own awareness of the need for better standards. Comment, *Policing Plutonium: The Civil Liberties Fallout*, 10 Harv.Civ.Rights—Civ.Lib.L.Rev. 369 (1975).

These and other reasons support the proposition that the general rule should be no different for the atomic industry. Compliance with government safety regulations should be accepted as evidence of acting reasonably, but should not be used as conclusive proof because too many variables exist in any given situation for an absolute standard to apply. Comment, *Radiation and Preconception Injuries: Some Interesting Problems in Tort Law*, 28 S.W.L.J. 414, 428 (1974).

This Court's holding conforms both to traditional principles of tort law and to the principles many anticipated would govern similar cases. Defendants' arguments have been made before and rejected by other courts in analogous contexts. It should not be surprising that one commentator described as "powerful precedent" for the radiation injured plaintiff the case of *McLane* v. *Northwest Natural Gas Co.*, 255 Or. 324, 467 P.2d 635 (1970), which involved the explosion of a natural gas storage tank. There the court rejected the contention of a heavily regulated public utility that state authorizing legislation, which expressly permitted such storage of natural gas, prohibited imposition of

strict liability. The court further rejected the utility's contention that the presence of safety regulations required a violation of some regulation before liability could be imposed. With surprising foresight, the writer aptly described these as likely defenses available to a nuclear operator, such as Kerr-McGee here. Comment, *The Irradiated Plaintiff: Tort Recovery Outside Price-Anderson*, 6 Environ.L. 859, 886-87 (1976).

The same general rule is applicable to actions for radiation injuries where a plaintiff's exposure is within the maximum permissible exposure regulations established by the AEC. These regulations are not intended to represent levels of radiation exposure at which no injury may be inflicted. Indeed, the exposure level regulations were adopted by the AEC from standards originally promulgated by the National Council for Radiation Protection and the International Commission on Radiological Protection solely as guides for good radiation practices rather than strict levels of safety. Hallmark, *Radiation Protection Standards and the Administrative Decision-Making Process*, 8 Environ.L. 785, 794, 800 (1978). Both the NCRP and ICRP have continuously emphasized that these recommendations were furnished as guides and both bodies cautioned against their adoption as rigid standards. Hansen, *Development and Application of Radiation Protection Standards*, 12 Idaho L.Rev. 1, 9 (1975). Both the AEC and the Environmental Protection Agency adopt the position that these levels are not a "safe" or threshold level below which injury does not become a possibility. Baram, *Radiation from Nuclear Power Plants: The Need for Congressional Directives*, 14 Harv. J.Leg. 905, 907 (1977).

Thus, the standards represent a balancing of social benefit against estimated cost, a calculated risk in an area where scientific knowledge of low level radiation exposure effects is insufficient to determine the precise risk actually involved. Green, *Radiation Wastes and the Environment*, 11 Nat.Res.J. 281, 292 (1971); Comment, *Survey of the*

Governmental Regulation of Nuclear Power, 59 Marq.L.Rev. 836, 843 (1976). Hallmark, *Radiation Standards and the Administrative Decision-Making Process*, supra, at 794, 808.

> "The setting of exposure standards at a given level requires the weighing of these risks and benefits to be derived therefrom. The weighing requires a value judgment as well as a measuring, and thus the standards are not scientific numbers below which no danger exists.
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> "There has been a history of disagreement with the established radiation protection standards on the part of some members of the scientific community. The basis for this disagreement has often been the fact that science has been unable to fully discover the biological effects and costs of inozing radiation. . . . This ignorance make it impossible to assess fully the risks attendant to exposure in ionizing radiation."

Crowther v. *Seaborg*, 312 F.Supp. 1205, 1231-32 (D.Colo. 1970); see also *Citizens for Safe Power, Inc.* v. *Nuclear Regulatory Comm'n*, 173 U.S.App.D.C. 317, 322, 524 F.2d 1291, 1296 (D.C.Cir. 1975) (undetermined whether exposure at guideline levels will or will not have injurious effects).

Indeed, this acknowledgement of the limitations of the regulations led to the adoption in 1970 of the concept of "as low as practicable," later changed to "as low as reasonably achievable." This additional standard imposes on licensed operators the duty to maintain the release of radioactive material to unrestricted areas as far below the regulation limits as is practicable (now reasonably achievable). Baram, *Radiation from Nuclear Power Plants*, supra, at 927-28; *AEC Staff Study of the Price-Anderson Act, Part I*, supra, at 267.

Even though the maximum permissible exposure ceiling has been frequently rendered more stringent over the years, see Rogers, *The Development and Use of Regulatory*

Standards, 14 Atomic En.L.J. 173, 178 (1972); Goodman, *Radiation Injuries*, 5 Atomic En.L.J. 20, 23 (1963), the regulations still embrace the idea that exposure within the standards pose a potential for personal injury. Green, *Nuclear Power: Risk, Liability, and Indemnity*, 71 Mich.L.Rev. 479, 481 (1972-73); Taylor, *Standards for Protection Against Radiation*, 12 Atomic En.L.J. 139, 141 (1970); Comment, *Nuclear Torts, The Price-Anderson Act and the Potential for Uncompensated Injury*, 11 n.Eng.L.Rev. 111, 113 (1975); Note, *The "Extraordinary Nuclear Occurrence" Threshold and Uncompensated Injury Under the Price-Anderson Act*, supra, at 383 (1974).

> "In view of our present lack of knowledge as to exactly how damaging small doses [of radiation] are likely to be over a long period of time, the Commission's exposure regulations cannot be said to fix definitively the point at which radiation becomes unacceptably dangerous."

Stason, Estep, and Pierce, *Atoms and the Law*, supra, at 128; see also Hansen, *Development and Application of Radiation Protection Standards*, 12 Idaho L.Rev. 1, 26 (1975) (exposure limit standards not decisive in determining liability in tort cases).

Some writers, however, have expressed their view that more deference should be paid these exposure limit regulations. In their treatise on the subject, Professors Stason, Estep and Pierce suggest that whenever someone is exposed to radiation where the amount of radiation received, or the circumstances in which it was received, do not violate the applicable health and safety regulations, compliance should be argued to prove reasonable conduct. These authors urge that where the AEC makes a deliberate judgment on the specific issue of maximum exposure levels, a judge should hold compliance with that requirement as conclusive proof of compliance with a reasonable standard of conduct. Stason, Estep and Pierce, *Atoms and the Law*, supra, at 127-28.

These authors, however, acknowledge that both major treatises on torts reject this view. See 2 Harper & James, *The Law of Torts*, § 17.6 at 1014 (1st ed. 1956); Prosser, *Law of Torts*, § 36 at 203 (4th ed. 1971), cited in *Atoms and the Law*, supra, at 129. The authors conclude that:

> "[c]ompliance or non-compliance with industry safety codes certainly should be given weight, and in most cases perhaps should constitute prima facie, if not conclusive proof, *when no evidence to the contrary is introduced*. Courts, however, should avoid a rigid rule and decide individual cases on the basis of the specific evidence produced." (Emphasis added.)

Id. at 155. At a later point in their treatise, the authors acknowledge that nuclear operators may be held liable for damages for the escape of nuclear materials, even where the amount that escapes is within the permissible governmental limits. Id. at 722.

More recent writers have also suggested that a greater deference be given governmental exposure limits, but they acknowledge that as presently written, the regulations may not be so construed. These authors suggest possible use of the government regulations as a per se defense to a latent injury radiation claim, whereby a court would find that a plaintiff has failed to establish causation of his cancer by any exposure within the permissible governmental limits. Keyes and Howarth, *Approaches to Liability for Remote Causes: The Low Level Radiation Example*, 56 Iowa L.Rev. 531, 567-69 (1975). The writers acknowledge that:

> "[a]t the present time, however, the AEC has not declared the permissible dose level standards to be absolute safety limits. Nowhere in the regulations does any such language appear. The standards are considered only to be guidelines. *Their use as a negligence-limiting factor, therefore, is severely limited.* Employees are in no way precluded from bringing suit upon

radiation exposures even well below the maximum permissible standards.

* * * *

"[The standards] are not . . . being granted any conclusive weight. Thus despite the fact that medical science feels the probabilities of direct causality are so remote between radiation at levels below the maximum prescribed standards, and a cancer or other disease, plaintiffs are not estopped from winning their cases." (Emphasis added.)

Keys and Howarth, *Approaches to Liability for Remote Causes*, supra, at 545-46.

These writers acknowledged that the standards represent a policy of balancing the benefits to society from the use of atomic energy and the possible harm to individuals from radiation. They continue:

"Implicit in this decision is the assumption that, although very slight, some harm may be possible to those exposed below the permissible standards. It is, therefore, difficult to argue that these should be a judicially noticeable standard which would serve as a per se defense through the refusal of courts to consider any possible causal link between radiation and injury."

Id. at 567.

The authors conclude that it is "unfortunate" that in radiation litigation the published radiation exposure standards are merely "some evidence" going to the weight of the evidence to be evaluated on both negligence and causation.

"However, it would not appear that this per se defense approach can be supported without amendment of the law and the present AEC regulations and manual requirements. *Mere compliance with the standards will not be interpreted as determinative of the issue of*

negligence and causation in the absence of a specific indication on the part of the promulgators of the standards that this was their intent." (Emphasis added.)

Id. at 570; see also Hamilton and Krebs, *Radiation Protection Regulation: An Opportunity for Cooperative Federalism*, 12 Vand.L.Rev. 395, 407-08 (1959) (basic problem of radiation protection is to ascertain how much exposure may be permitted; separate problem is to determine what special measures are required to provide compensation to those injured by such exposure).

In one of the few latent injury radiation cases to reach a court, the Court applied this approach. In *Mahoney* v. *United States*, 220 F.Supp. 823 (E.D.Tenn.), *aff'd*, 339 F.2d 605 (6th Cir. 1964), a radiation worker who received exposures within the governmental regulatory limits was denied recovery of damages for his cancer on grounds that he failed to prove causation between the exposure and the disease. Compliance with the guideline limits, however, was treated only as some evidence of the lack of a causal nexus. It is clear that the court did not treat the regulations as conclusive on the point.

Even the adoption of the Stason, Estep and Pierce suggestion would not aid the Kerr-McGee defendants here. As noted in the record, Silkwood's exposure took place at home in her apartment. Although her body burden constituted approximately one-fourth of that permitted by regulation for a radiation worker during her lifetime, it exceeded by two and a half times the exposure permitted to any other member of the public. The mere fortuity of her employment rendered the exposure within governmental guidelines. Any visitor in the apartment who received the same exposure would represent a clear violation of the exposure limit regulations.

It is also clear that the circumstances under which Silkwood received the exposure were not embraced by the government regulations. The ten-fold difference in stan-

dards for workers and non-workers obviously does not reflect a medical judgment that non-workers are more prone to the biological effects of radiation. Rather, the standards reflect the philosophy that a radiation worker tacitly assumes the very small risk attributed to receiving radiation doses not exceeding the currently acceptable permissible limits. Assuming that the worker is properly informed of the nature and magnitude of the risk, as far as known, the market price for labor needed to induce workers to accept the occupational hazard should be commensurate with the risk. The market price of labor essentially compensates the worker for taking the risk. See Keys and Howarth, *Approaches to Liability for Remote Causes*, supra, at 542.

Silkwood, of course, did not assume in her occupation the risk of the contamination of her apartment. Nor were her employment wages designed to compensate her for any possible radiation exposure to which she might be subjected by a Kerr-McGee accident unrelated to her work at the plant. The jury in this case failed to find proof that the plutonium was carried by Silkwood from the facility. In essence, no showing was here made that Silkwood's contamination was an "occupational hazard" the risk of which an employee customarily assumes. Thus, the argument for application of the higher permissible exposure regulations for workers fails under these conditions. Even were these standards entitled to conclusive effect, in all likelihood the Court could not have so instructed the jury in the instant case.

Little further need be said on this Court's failure to instruct the jury that substantial compliance with government regulations would bar an award of punitive damages. The existence of wanton conduct depends upon the actor's or tortfeasor's mental attitude at the time of the conduct. *Tappen* v. *Ager*, 599 F.2d 376, 382 (10th Cir. 1979). The culpable mental attitude necessary for punitive damages was set forth in the punitive damage instruction. For the same reason that mere compliance with government regu-

lations cannot necessarily be found consistent with the reasonable person standard, so too it cannot necessarily be found consistent with an attitude and conduct devoid of that state of mind for which an award of punitive damages is appropriate.

As in the drug and aviation cases noted above, a manufacturer may be found to have duties in addition to or different from those prescribed by regulation. A mere failure to act as a reasonable person in conformity with that duty would constitute negligence. A knowing and intentional disregard of that duty might under some circumstances constitute the gross recklessness and indifference to the safety of others that render punitive damages appropriate.

No one could argue, for example, that a manufacturer who knew that its drug would cause blindness would not be responsible for punitive damages for knowingly marketing that product for profit, even though the drug had been approved for distribution and marketing after compliance with all FDA regulations. Similarly, no one would question the propriety of punitive damages assessed against an airplane manufacturer who, for example, knew that its plane was defectively designed and could crash during flight, notwithstanding that the manufacturer had complied with all government regulations and obtained an FAA certificate for the craft as airworthy. Cf. *Tinnerholm* v. *Parke Davis & Co., supra* (FDA testing requirements for drug failed to reveal drug's ability to cause injury; liability imposed); *Gillman* v. *Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975) (television manufacturer liable for punitive damages where evidence showed knowledge of grave danger to safety and failure to redesign or warn).

Similarly, Kerr-McGee's argument that compliance with regulations would still permit the escape of small quantities of plutonium overlooks the circumstances where punitive damages might be appropriate for damages caused through that escape. Surely defendants would not argue that puni-

tive damages would be inappropriate if a nuclear licensee knew of the time and manner of the plutonium's escape, but did nothing to prevent it because the regulations did not require it. Similarly, if a licensee were aware of defects within its facility that would render likely repeated exposures of employees to plutonium, but did nothing to correct it, as some evidence in this case indicated, punitive damages might be considered, regardless whether government regulations required those changes to be made. The character of the conduct and the state of the actor's mind control the propriety of punitive damages, and not merely whether that conduct complies or fails to comply with a government regulation. See Restatement, *Torts* § 908(2) com. e at 556-57 (1939).

Defendants argue that the Court's instructions would result in imposition of punitive damages on a defendant who relied on the government standards in good faith. This is not the case. Good faith belief in, and efforts to comply with, all government regulations would be evidence of conduct inconsistent with the mental state requisite for punitive damages. Defendants placed this matter in issue and introduced evidence in this regard. Defendants were free to argue their good faith conduct in operating their facility safely. The jury was instructed to judge that conduct in light of the standards for the imposition of punitive damages. Had the jury believed this evidence, an award of punitive damages would not have been appropriate. Defendants' argument that their conduct could not have been so found, based on the record, will be dealt with below.

Defendants' argument that no liability for actual damages may be imposed when a plaintiff's exposure is within governmental regulatory limits has been shown to be erroneous. Defendants' further argument that no punitive damages may be awarded on these facts similarly misses the point. Punitive damages in this case were awarded for conduct that caused or permitted the escape of plutonium and led to the contamination of Silkwood in her apartment. The jury was so instructed.

Had this Court held that punitive damages could not be awarded unless exposure limit regulations were exceeded, the Court would have committed serious error. Such an instruction would bar punitive damages in situations where a defendant might intentionally violate every federal regulation controlling the operation of the facility, a condition where authorities agree a defendant would be found negligent per se. Comment, *The Irridated Plaintiff: Tort Recovery Outside Price-Anderson*, supra, at 872; Prosser, *Law of Torts*, § 36 at 200 (4th ed. 1971); Stason, Estep and Pierce, *Atoms and the Law*, supra, at 119 (violation of a statutory or administrative standard makes a prima facie case of lack of due care). If a defendant knowingly and grossly violated these operational regulations and thereby permitted a large quantity of plutonium to escape, punitive damages would be properly submissible to the jury, even if only a limited exposure to one person within the guidelines were shown.

The Court should add a few general comments on defendants' preemption arguments to focus on and clarify different aspects of those arguments that are not always clearly raised. Defendants' argument against the application of strict liability or negligence absent a violation of government regulations embraces the proposition that because the government has legislated in the area, it has occupied the field and precluded application of state liability principles. As demonstrated above, Congress clearly had no such intention.

More troublesome, however, is defendants' related contention made explicit at oral argument on these motions that they had no duty to contain plutonium within their facility, other than that imposed by federal law, to protect members of the public from this dangerous substance. Unless federal law imposed the obligation, and presumably unless federal law imposed liability for its breach, defendants are allegedly immune for any damages caused by the escape of plutonium.

This proposition is, of course, legally unsupportable. As noted above, these defendants had a duty under part 20 of Title 10 of the Code of Federal Regulations to maintain the release of radiation "as low as reasonably achievable." Compliance with this standard cannot be demonstrated merely through control of escaped plutonium to within any absolute amount. See *York Committee for a Safe Environment* v. *United States Nuclear Regulatory Comm'n*, 174 U.S.App.D.C. 29, 527 F.2d 812 (D.C.Cir.1975). It is, therefore, not inconsistent with any Congressional design to impose liability upon defendants for actual damages for escape of plutonium caused by negligence or lack of reasonable conduct. Nor is it inconsistent to impose punitive damages for the escape of plutonium caused by grossly negligent, reckless and willful conduct. Common law duties also exist for the breach of which liability may be imposed, as discussed above.

The additional contention apparently underlying defendants' primary arguments that no liability may be imposed outside Price-Anderson is likewise indefensible. This argument would suggest the anomaly that by insuring application of strict liability and adequate insurance coverage for major disasters, Congress peculiarly conferred immunity on operators for lesser nuclear accidents where, for example, actual damages and total deaths did not exceed $5,000,000. See 42 U.S.C. § 2210(n) (Supp. 1979); 10 C.F.R. § 140.85(a) (1974).

This argument would also imply that Congress left the entire nuclear industry immune for whatever catastrophic occurrence it caused subsequent to the Atomic Energy Act of 1954, and prior to the adoption of Price-Anderson three years later. Immunity would still exist today for those nuclear facilities, perhaps including fuel reprocessing plants like defendants' here, to which provisions of Price-Anderson do not apply. 42 U.S.C. § 2210(n)(1) (Supp. 1979); see also *AEC Staff Study of the Price-Anderson Act, Part II*, 16 Atomic En.L.J. 297, 304 (1975); England, *Nuclear Insur-*

ance and the Price-Anderson Act, 13 Atomic En.L.J. 27, 48-49 (1971). The enormity of the implication of even the suggestion of the proposition dispels any serious consideration. Congressional history conclusively refutes this contention. See S.Rep. No. 296, 85th Cong., 1st Sess., 9, *reprinted in* [1957] U.S.Code Cong. & Admin.News at 1810.

Imposition of common law liability is thus consistent with the virtually unanimous legal analysis and expectation extant in both legal and industrial communities. This Court instructed that compliance with regulations would be very strong, if not conclusive, evidence that punitive damages were not appropriate. Substantial compliance was entitled to strong consideration to the same end. These instructions adequately reflect the law on the facts of this case and, if anything, were overly generous to the defendants.

Defendants never came forward with those regulations with which they claimed substantial compliance. There was evidence of regulatory noncompliance. A Kerr-McGee witness during the trial conceded that the defendants' inventory difference, or the amount of plutonium unaccounted for by the defendants at their facility, slightly exceeded that permitted by regulation. An NRC official called by defendants testified that he did not feel that Kerr-McGee was conforming its conduct to the "as low as reasonably achievable" standard. Dr. Karl Morgon, a plaintiff's witness, testified that Silkwood's exposure did not conform to ICRP guidelines and part 20 of the federal regulations for an exposure received within a single year, even though Silkwood's burden was within the regulation limits for a lifetime exposure.

Other regulations control defendants' conduct in the instant situation. They forbid a licensee from possessing, using or transferring plutonium in such a manner that radiation levels in unrestricted areas could exceed prescribed levels. 10 C.F.R. §§ 20.105(b), 20.106(a) (1974). Although

the parties disagree, the record contains some evidence that the level of plutonium in Silkwood's apartment may potentially have exceeded that permitted in an unrestricted area, such as a residence.[1]

The general question of how much compliance should be considered "substantial" is, of course, an undefinable factor ultimately left to the wisdom of the jury in its judgment of defendants' operation of their facility. One plaintiff's witness, Dr. Morgon, offered his opinion that if rated or graded for their operation of the Cimarron facility, defendants should receive an "F" or failing grade. One defense witness, a regional director of the NRC, himself stated that the facility would in his judgment receive a "C." The question for the jury was to judge the relevant operations of the plant as defined in the instructions solely on the basis of the evidence before them and in light of the standards given by the Court for negligent, or for reckless and wanton conduct.

It was a factual question solely for the jury to compare defendants' conduct with the regulatory standard and decide whether the record demonstrated "substantial," "minimal" or "bare" compliance, or noncompliance of whatever degree. In the last analysis, however, the jury must still compare this factual finding of the defendants' conduct with the legal standards appropriate for liability for negligence or for punitive damages. All the relevant evidence was

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[1] The applicability of this specific regulation was first addressed by the parties by way of letter to the Court after argument on these motions. Compliance with this specific regulation was not argued during the trial. In their letters to the Court, the parties could not agree on the factual question of whether compliance was demonstrated by the record. Since the issue of compliance with this regulation came up as an anonymous number in the trial but was not specifically addressed in the evidence or law before the jury, it is an extraneous issue for the purpose of the Court's decision on the extant motions, even though latent in the total evidence and law governing this case.

before the jury and the jury was required by law to measure that against the applicable legal standards. Defendants do not disagree with the legal standards, but rather disagree with the factual finding reached by the jury in judging defendants' conduct against the standards.

Defendants propose in their "substantial compliance" criterion an inflexible standard unknown elsewhere in tort law and unpermitting of just application to any variety of different factual situations. It imposes upon the Court the additional, onerous burden of instructing the jury on an indefinitely large number of unspecified and complicated regulations. The Court must then inform the jury that "substantial" compliance with these regulations bars absolutely any award of punitive damages. Whether any regulation is entitled to greater weight than others is left unclarified. Artificial erection of this undefinable, absolute barrier against punitive — or even actual — damages would be an invasion of the proper function of the jury inconsistent with the role of administrative regulations in assessment of a defendant's exercise of due care.

Indeed, defendants' strenuous reliance on the cloak of "substantial compliance" as an absolute defense against actual or punitive damages is rather anomalous. It is predicated, presumably, on the idea that the escape of 300 micrograms of plutonium from their facility does not represent "substantial" noncompliance with federal regulations. Yet defendants apparently do not maintain that federal regulations authorize the distribution of 300 micrograms of plutonium into each of various random households in the public domain. Defendants' absolute theory of "substantial compliance" would also apparently bar punitive damages even where a licensee intentionally and maliciously planted this plutonium in a household. The instant amount would simply not represent a "substantial" violation of any regulations. Such a standard improperly diverts the jury's focus from considerations properly germane to the determination

of whether punitive damages are appropriate. The Court correctly chose not to instruct the jury in such a manner.

APPLICABILITY OF WORKMEN'S COMPENSATION LAWS

Defendants in substance raise two arguments why workmen's compensation laws allegedly apply to the plaintiff's claim to bar its assertion on common law grounds in federal court. First, defendants contend that the mere coincidence of the nature of defendants' business enterprise and the type of injury suffered is sufficient to render applicable the Oklahoma compensation statute. This Court has already disposed of this contention in an earlier order in this case dated December 12, 1978. The Court will not again address it at length here.

The authority cited in the prior order, as well as the cases relied upon by defendants in their brief in support of this motion, indicate that a causal connection between work and injury must exist before compensation laws apply. The mere coincidence that the injury for which suit is brought is the same type as that to which the plaintiff exposes herself at work is insufficient to demonstrate this causal nexus. Even when the individual sued is fortuitously the plaintiff's employer the causal connection is still absent. Neither coincidence establishes that the injury has been suffered as a causal result of the plaintiff's employment.

Demonstrative examples are appropriate. Under defendants' reasoning, a public utility worker who coincidentally installs gas furnaces could not sue the utility at common law if his own furnace exploded at home. A worker at a television manufacturer similarly could not sue that company if his defective television exploded at home. So, too, a nuclear worker would be unable to sue her employer for radiation injury suffered on vacation by driving through a spill of uranium by that company on a public highway. In each example, the causal nexus is ab-

sent. The Court need look no further than defendants' own authority to reject the proposition asserted.

Defendants' second argument is built upon the first. Defendants contend that when the coincidence of defendant and injury exists, a plaintiff has the burden of pleading and proving affirmatively that the causal connection does *not* exist. Because the plaintiff would be entitled to a presumption under the compensation laws that the injury arose out of and during the course of employment in an action brought under that act, it is argued that defendants are entitled to the protection of that presumption in an action not brought on compensation laws. Because in Oklahoma compensation plaintiff may arguably prevail without showing specifically how the injury was work-related, plaintiff may not bring a common law action unless he proves that the injury was not work-related. In situations like the instant case, where no jury finding establishes the fact either way, a plaintiff may not recover at common law, even though defendant might otherwise be strictly liable without any such showing.

Quite simply, there is no authority that supports such a proposition. Defendants have not cited any authority, nor has the Court found any. Defendants' citation to Kansas law and *Wilburn* v. *Boeing Airplane Co.*, 188 Kan. 722, 366 P.2d 246 (1961), is unavailing. There is nothing in Kansas law that would compel a plaintiff to prove as an element of his common law claim the non-existence of an affirmative defense available to the defendants. Adoption of the argument would constitute a new horizon in the traditional field of tort litigation.

Application of this proposition also frustrates application of strict liability in typical product liability suits for an entire class of plaintiffs who have an employment relationship with the defendant. In the example above, an administrator for the deceased utility worker would be required to prove that the furnace did not explode as a part of his employment. Again, lest the Court overindulge in

hypothetical example, twenty nuclear workers exposed to plutonium away from work while shopping individually in a store could not recover unless they demonstrated how the plutonium got into the store, even though no evidence is introduced which of the twenty, if any, brought plutonium into the store. Non-workers could recover on strict liability grounds without any similar showing.

Reason does not support segregation of these particular plaintiffs from the rest of the world merely because of the fortuity of their employment relationship to a defendant and the similarity of the hazard involved. The Oklahoma compensation statute expressly and unequivocally restricts the operation of any presumption to actions brought *under* that act. Quite clearly, the workmen's compensation bar is an affirmative defense that the employer must raise in each of the hypothetical examples noted above. Defendants cannot here place on plaintiff the burden of proof of the non-existence of facts supporting their defense.

Contrary to the defendants' arguments, and as they well know, the compensation issue was indeed submitted to the jury, and the factual finding was against the defendants. It was the Court's determination that a formal workmen's compensation issue could not be presented to the jury without an involved dissertation on the nature and purpose of compensation laws, their difference from traditional common law tort claims, and the real possibility such an instruction would confuse the jury and thwart the process of justice. Actual submission was made to the jury by submission of the specific factual issue of whether Silkwood intentionally took plutonium to her apartment. Here the jury found the defendants' evidence insufficient to establish by a preponderance of the evidence that Silkwood intentionally took plutonium to her apartment. The evidence that Silkwood might have accidentally taken the plutonium home on her person or clothing was weak, speculative, and contradicted by virtually all defendants' own evidence. The Court could not properly submit a question with no evi-

dentiary foundation to the jury. Nothing more was required to avoid the defense that compensation laws barred the instant claim.

Defendants argue that if Silkwood's contamination took place during the collection of a urine sample, then it took place during the course of her employment. This again merely begs the question on which defendants had the burden of proof. The only evidence that the contamination so occurred was Silkwood's own speculation. That alone was insufficient.

Indeed, in the Rule 51 conference this Court specifically asked defense counsel whether they contended the plutonium moved into Silkwood's apartment inside a contaminated urine kit. This Court was considering whether to send that issue to the jury, but upon counsel's unqualified negative response the Court refrained. Defendants did not then object and the Court will not now hear them raise this claim by indirection after an adverse verdict. See *United Steelworkers* v. *CCI Corp.*, 395 F.2d 529 (10th Cir. 1968).

CHALLENGES TO THE VERDICT

Defendants here contend that the verdict in this case is both excessive and contrary to the weight of the evidence and accordingly should be set aside. On the latter ground, defendants argue that a verdict must be granted for defendants.

The question whether a new trial is proper because the verdict is contrary to the weight of the evidence is normally a question of fact and is addressed to the sound discretion of the trial court. *Champion Home Builders* v. *Shumate*, 388 F.2d 806 (10th Cir. 1967). On a motion for new trial, the Court should view the verdict in the overall setting of the trial, consider the character of the evidence and the relative complexity of the legal principles which the jury was bound to apply. The Court should abstain

from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. *Bevevino* v. *Snydjari*, 574 F.2d 676 (2d Cir. 1978). Where the trial court is of the opinion that a new trial is proper, however, the remedy should be granted. *Holmes* v. *Wack*, 464 F.2d 86 (10th Cir. 1972).

From examination of the record and familiarity with the evidence at trial, the Court finds that the evidence was more than adequate to sustain the verdict reached. Defendants' argument that the only evidence in the record supports the view that Silkwood intentionally removed the plutonium is unavailing. Jurors are the exclusive judges of credibility and of the weight to be given the testimony of any witness. *Boehm* v. *Fox*, 473 F.2d 445 (10th Cir. 1973); *Jaeco Pump Co.* v. *Inject-O-Meter Mfg. Co.*, 467 F.2d 317 (10th Cir. 1972). The jurors were free to reject that evidence altogether, or find it speculative and unconvincing. With the burden of proof on that issue, defendants then fail in their affirmative defense. Similarly, defendants unconvincingly argue that the evidence conclusively shows that Silkwood's intentional removal of plutonium was the most probable of all possibilities. This misconstrues the nature of defendants' burden.

Defendants had the burden of proving their defense as a true fact by a preponderance of the evidence — that is, that it was likelier true than not true. Defendants' argument subtlely misdirects the analysis and finds that burden satisfied if one possibility is likelier true than is another possibility, regardless whether it is likelier true than not true. Needless to say, one improbable possibility may be more probably true than another, while both are so improbable that neither is established as likelier true than not. Defendants' proposition would embrace within jury findings the potential for total speculation and conjecture.

A trial judge has the chief responsibility for passing on the question as to whether a new trial ought to be

granted on the ground of excessive or inadequate damages. *Ryen* v. *Owens*, 144 U.S. App. D.C. 332, 446 F.2d 1333 (D.C. Cir. 1971). A verdict should not be set aside unless the Court is convinced that it is the result of bias, prejudice or passion. *Metcalfe* v. *A.T. & S.F. Ry.*, 491 F.2d 892 (10th Cir. 1974); *Wells* v. *Colorado College*, 478 F.2d 158 (10th Cir. 1973).

It is this Court's considered opinion that the verdict in this case does not fall within that category. Nor is the verdict beyond all reason or so great as to shock the Court's conscience. See *Williams* v. *Steuart Motor Co.*, 161 U.S. App. D.C. 155, 494 F.2d 1074 (D.C. Cir. 1974). While the award of actual damages in this case was high for the short period involved, and perhaps greater than this Court would have himself imposed, it is not so clearly excessive that the Court finds it an injustice or unacceptable based upon the evidence.

With the evidence and all reasonable inferences to be drawn therefrom viewed in the light most favorable to plaintiff, see *Ahern* v. *Veterans Administration*, 537 F.2d 1098 (10th Cir. 1976); *Joyce* v. *Davis*, 539 F.2d 1262 (10th Cir. 1976), the record contains substantial evidence to support the jury verdict for actual damages. So viewed, the record presents a Kafka-like picture of a young woman who was contaminated by an originally unknown amount of plutonium that was inexplicably found in her apartment. She was fearful of a slow death from cancer, became hysterical at times, and approached a nervous breakdown as she became the focus of federal agency and industry investigations into the incident. Because of the uniqueness of her injury, she was compelled to place herself for medical care in the custody of those whom she distrusted. The mental anxiety associated with this experience was for the jury to measure, together with whatever physical injury the jury found she suffered.

Where experts are in sharp disagreement over the injuries sustained, the Court must not try the case de novo. *Volis* v. *Puritan Life Ins. Co.*, 548 F.2d 895 (10th Cir. 1977). This Court is uninclined to stray into the province of the jury and examine their finding based upon conflicting evidence. See *United States* v. *79.95 Acres of Land, Rogers County, Oklahoma*, 459 F.2d 185 (10th Cir. 1972).

The Court is even less inclined to view the punitive damages awarded in this case as excessive. Defendants argue that the Tenth Circuit has held a ratio of punitive to actual damages of 11 to 1 as excessive, and that *a fortiori*, the ratio of 20 to 1 in the instant case is excessive. This argument is entirely misplaced. Reliance on *Dearmore* v. *Gold*, 400 F.2d 887 (10th Cir. 1968), fails to note that it was a per curiam opinion setting aside a damage award and remanding for a new trial as both parties desired. A jury had awarded only $841.54 actual damages, where uncontroverted evidence established damage at more than $700, without pain and suffering, and established unquestioned pain and suffering and probable future medical expense. Punitive damages of $10,000 were awarded. Without delving into the jurors' thinking, but noting the appellee's argument that the jury awarded out-of-pocket expenses as actual damages, and pain and suffering and future expenses as punitives, the Court concluded the fairest disposition to be a new trial.

Indeed, application of a ratio approach to excessiveness expressly contradicts Oklahoma law. Defendants implicitly acknowledge this by quoting *Misco Leasing, Inc.* v. *Keller*, 490 F.2d 545 (10th Cir. 1974) — punitive damages may exceed actual damages as long as the amount is reasonable and bears some relation to the injury inflicted. Defendants' Brief at 29. Defendants' argument that the punitive verdict must bear some relation to the actual damages awarded misreads the quote and contradicts Oklahoma law. A punitive award need *not* bear any necessary rela-

tion to the actual damages awarded. *Garland Coal & Mining Co.* v. *Few*, 267 F.2d 785, 791 (10th Cir. 1959).

By statute, a relationship need only exist between the amount of punitive damages awarded and the *injury* inflicted. Okla.Stat.Ann. tit. 23, § 9. Little imagination is needed to discern the disparity between actual and punitive damages where, for example, a defendant inflicts a very serious injury, but where the suffering from that injury is terminated by an intervening and unforeseeable act of God. Punitive damages would be for intentional infliction of an injury severe enough to cause long term suffering. Punitive damages would only be required to bear a relationship to that injury inflicted, and not to the figure for actual damages that reflect the lesser period for pain and suffering actually experienced.

Defendants additionally argue that no punitive damages were justified on the instant record because no evidence was introduced of any defendants' act toward Silkwood that was reckless, wanton or malicious. This belies the point. Although defendants here disagree, Kerr-McGee had a duty to keep plutonium within their facility. Reckless, wilful, and wanton conduct in the operation of the facility so as to permit plutonium to escape into the public domain is evidence of conduct that permitted the infliction of the instant injury to Silkwood. The Court has addressed defendants' contention above that no such duty existed. Defendants' contention that permitting plutonium to escape, without more, cannot be the proximate cause of Silkwood's injury is addressed below.

Plaintiff's evidence established substantial, credible evidence of poor training, poor security, workers who knew of a variety of ways to remove large amounts of plutonium from the facility without detection, workers indifferent to the hazards of plutonium, and much more, all of which tended to establish the propriety of a punitive award. There was conflicting evidence, however subject to credibility

tests, of an uninformed or indifferent management. The amount of the punitive award was particularly within the province of the jury to decide in light of the purpose of punitive damages, the character of defendants' conduct, the hazardous nature of plutonium, and defendants' knowledge and state of mind. See Restatement, Torts, § 908(2) com. e at 556-57 (1939). In short, crassness of conduct may govern the amount of award commensurate with a defendant's financial ability.

The Court finds ample evidence in the record, if found credible by the jury, to support a very large punitive award. The Court will not set aside the verdict reached.

In a memorandum overruling defendants' motion to interrogate the jurors post-trial, the Court has already noted the high caliber and representative characteristics of the individual jurors, as well as their dedication to their duties as jurors. The jury in this case deliberated for four days and once sought guidance from the Court. Neither the verdict's size nor the conduct of the deliberations reflect a passioned or biased view of the evidence or reaction to trial tactics of the competent counsel on either side. Consequently, the Court cannot characterize the verdict as the product of passion, bias or prejudice. Finally, while the amount of the punitive award may have exceeded what the Court would have allowed. It appears to be within the confines of the evidence and the tenets of applicable law. As such it neither represents an injustice nor shocks the conscience of the Court on the instant record.

PUBLICITY

The Court finds no merit whatever in defendants' contention that pre-trial, trial and post-trial publicity deprived these defendants of the opportunity for a fair trial. The Court fails to see the relevance of post-trial publicity to defendants' argument that the trial was less than fair. Defendants cannot maintain that after the trial concluded, the

fairness of that completed process, or the deliberations of a jury already discharged, were somehow altered by subsequent statements in the press.

Nor does the Court look favorably on defendants contention that pre-trial publicity was so pervasive and prejudicial that a fair trial was impossible. The Kerr-McGee defendants themselves urged upon this Court an early trial date, even over the opposition of plaintiff. Defendants expressed their readiness to proceed to trial in early Spring in Oklahoma City, so that the lengthy trial would not have to be delayed until the next available date on this Court's calendar in the Fall. Defendants never mentioned that pretrial publicity potentially still in the minds of jurors chosen from the panel might prejudice either of the parties. Nor did these defendants do the obvious if they felt that pretrial publicity, which was largely four years old, posed a threat to the fairness of the proceedings. Fully aware of the publicity generated by the case, both locally and nationwide, defendants never moved for a change of venue for trial and never communicated to the Court serious apprehension about the pre-trial publicity concerning the case. Indeed, it was the sense of the Court that defendants were well pleased with the Oklahoma City trial situs.

Furthermore, the Court permitted an extensive voir dire of the jury panel that lasted from early morning until late that same evening. Counsel were permitted to conduct their own voir dire and inquire into each potential juror's familiarity with the case, his or her knowledge, state of mind, and personal predilections, if any. Never once prior to or during the trial did counsel suggest the possibility that pre-trial publicity posed a threat to the fairness of the trial. Defendants' desire to raise this issue after an adverse verdict detracts from the seriousness with which the Court considers it.

This Court also finds no merit in defendants' argument that publicity of this trial and other nuclear acci-

dents, most notably the incident at Three Mile Island, prevented a fair trial. Again, this Court repeatedly admonished the jury on a daily basis to disregard any debate or discussion of other events or issues bearing generally on nuclear power. This Court specifically addressed the Three Mile Island incident and cautioned the jury that it had nothing to do with the facts and issues before them. The jury was admonished not to view the movie "China Syndome" and not to let any aspect of the nuclear debate affect their deliberations on the narrow issues of this trial.

The Court has no reason to believe that the admonitions were not heeded. Upon the Court's inquiry, the jury forewoman indicated that no extraneous information or issues entered into the jury's deliberations. The Court early in the trial questioned two jurors regarding possible friendships with Kerr-McGee employees not revealed during voir dire. The Court then learned that one juror even refused to let a friend approach her whom she erroneously believed had begun work for Kerr-McGee after the trial commenced. The Court finds its admonitions sufficient to preserve in these jurors that objective and impartial state of mind necessary for a fair trial.

Quite simply, this Court presided over this trial and was fully aware of the nature and extent of news coverage in the Oklahoma City area. The Court simply disagrees with defendants' rather flamboyant description of the public interest in this trial. The press did report certain items of evidence not admitted before the jury which held prejudicial value for the defendants. The press also reported on numerous occasions, however, the parade of information regarding defendants' contentions on evidence relating to sex and drugs, which was information highly prejudicial to the plaintiff.

Defendants' suggestion that this Court poll the jury after each news report of a nuclear incident without even the remotest connection or relevance to the issues in this case or the evidence being placed before the jury is un-

realistic. Although the news accounts may have had bearing on the general national debate upon the potential benefits and costs of nuclear power, the jury was cautioned repeatedly during voir dire, presentation of evidence, and again in the Court's instructions, that any specific aspect of the public debate on nuclear power must not be considered by them. This Court's inquiry of the jury forewoman shortly after the trial's conclusion dispels any notion that prejudicial effects of publicity entered into the jury's deliberations. The few statements of individual jurors and alternates that appeared in local Oklahoma City newspapers immediately after the trial corroborate this view. This Court is convinced that media publicity had no effect on the proceedings of the trial.

OTHER ARGUMENTS

Although the Court will not address each issue raised by defendants, additional comment is necessary on a few points. Defendants again raise their contention that the scope of the evidence was improper, and that the Court erred by excluding their evidence on numerous matters regarding Silkwood's sexual involvements, use of drugs, and purported suicide attempts. The Court entered in the record a memorandum order on this point, which adequately deals with the issue. In their arguments defendants never addressed the problem that Rule 404, Federal Rules of Evidence, rendered this evidence largely inadmissible, without regard to its tremendously prejudicial value upon which this Court chose to exclude it under Rule 403, Federal Rules of Evidence.

The parties should also consult *Hackbart* v. *Cincinnati Bengals*, Inc., 601 F.2d 516 (10th Cir. 1979), wherein a professional football player sought damages for a "late hit" by an opposing player which broke his neck. Defendants introduced evidence tending to show that plaintiff himself was a "dirty player" who had indulged in physical violence beyond that permitted by the rules. The Circuit

held the evidence irrelevant and improperly admitted by virtue of Rule 404's proscription on character evidence used to show conduct.

Defendants again argue that evidence of their negligent or reckless handling of plutonium in the facility was irrelevant to the issues in the case. Defendants refuse to acknowledge that evidence of defendants' lack of due care regarding security, training of workers, or their indifference to the hazards of plutonium and the safety of their employees, renders it more likely that the instant plutonium escaped from the facility because of defendants' ordinary or gross negligence. The evidence was, therefore, probative and competent circumstantial evidence of culpable conduct that proximately caused Silkwood's injury.

Hackbart, supra, is not to the contrary. The Court there found irrelevant evidence of extraneous acts of football violence in an intentional tort case. Once the Court rejected the applicability of the assumption of the risk defense, evidence that football was a commonly recognized "violent game" did not have any probative value on defendants' liability for a player's admittedly intentional striking of plaintiff.

Defendants also argue that they are entitled to a judgment or a new trial because no evidence establishes any act which proximately causes Silkwood's injury. Defendants must concede that but for the escape of plutonium from their facility, this injury would not have occurred. Nor may they dispute that radiation injury to individuals in their homes was a foreseeable result of the escape of plutonium barely visible to the naked eye. Defendants' theory of proximate causation would presumably require evidence that their agent brought plutonium physically into the apartment. In strict liability "dangerous animal" cases this would require a defendant to be responsible for moving the animal physically to a plaintiff's location before liability would attach. This is not the law. *City of Magnum* v. *Brownlee*, 181 Okla. 515, 75 P.2d 174 (1938) (bear

escapes from cage); see also Foster and Keeton, *Liability Without Fault in Oklahoma*, 3 Okl.L.Rev. 1, 11-16 (1950).

Furthermore, defendants' argument is another attempt to shift the burden to plaintiff to prove the absence of Silkwood's assumption of the risk to bar a strict liability claim, or the non-existence of an intervening cause sufficient to cut off the chain of causation requisite for a negligence claim. This, too, is not the law. Indeed, intervening acts do not bar liability under the Restatement provision, except possibly for the intentional acts of a third party. See Restatement (Second) Torts, § 522 (1976).

The difficulty of proving causation in radiation injury cases has been the subject of much legal debate, but only in the context of latent injuries where a plaintiff with cancer sues another for exposures occurring long previously. See, e.g., Keys and Howarth, *Approaches to Liability for Remote Causes: The Low Level Radiation Example*, supra at 545-46; Finks, *Radiation Injuries Compensable Under Workmen's Compensation*, 41 B.U.L.Rev. 183 (1961); Estep, *Radiation Injuries and Statistics: The Need for a New Approach to Injury Litigation*, 59 Mich.L.Rev. 259, 281-304 (1960); Note, *Problems of Tort Liability Arising from Nuclear Reactors*, 27 U.Cin.L.Rev. 415, 418 (1958). That problem is admittedly not present here. Plutonium from the defendants' facility was found in Silkwood's apartment where it exposed her to radiation and was proximately tied by evidence to her emotional distress. The question of proximate causation was properly submitted to the jury.

Defendants lastly raise the question of misconduct by the plaintiff's lead trial counsel that allegedly deprived them of a fair trial. This was a very long, hotly contested lawsuit wherein the parties pursued the litigation perhaps as much out of emotional belief in various principles as they did out of interest in this specific factual situation. At times the patient and tempers of lawyers wore thin,

as would be expected. There were infrequent instances, perhaps, of excesses that ought not to have occurred. Mr. Spence's remark to a defense witness, a long-time government investigator who interpreted the statement as designed to intimidate him, was unfortunate. The Court has no doubt, however, that this particular witness would not have been intimidated by a private lawyer's casual remark during a trial recess. Mr. Phillip's demeanor during cross-examination exhibited not the slightest feature of intimidation, as the Court would anticipate from an experienced man in his profession.

The Court need not address other alleged instances of improper conduct. Defendants themselves began this case with an opening statement that informed the jury that plaintiff's lead counsel was skilled in the art of "invading the vaults" of large corporations and insurance companies and "denuding them" of their money. Defendants closed with argument directly contradicting the Court's instructions and informing the jury that punitive damages should be considered as a reward to plaintiff's counsel and the estate they represented. In direct violation of court orders, defense counsel also brought to the jury's attention a matter whose exclusion this Court had ordered both several times from the bench and once by way of written memorandum inserted in the record and distributed to counsel. Neither plaintiff nor defendants are entitled to claim pristine innocence in their courtroom conduct in this case.

Invariably when counsel become so involved in matters of principle so strongly held by clients, better professional judgment in questions of fact and law may be overcome by momentary impulse. The result is not always a salutary one in strict terms of trial performance, but lengthy, complicated trials with much at stake are difficult to present without at least occasional obstructions of professional perspicacity. This is especially true when the

litigation is motivated by emotionally-fueled devotion to a client's principled position, which might perhaps cloud a more objective perception of the case.

This Court presided over the trial and did its utmost to keep prejudicial matters and conduct from the jury. The Court undertook appropriate action to erase whatever possible prejudicial impact might have been created whenever a counsel's conduct or tactics approached unfairness or impropriety in the Court's opinion. The Court is quite confident that these rare occurrences during the course of eleven weeks of trial did not have any ultimate impact on the jury in this case. This was not a perfectly tried case by either side, but neither the federal rules nor the requirements of due process dictate as much. It was the Court's apprehension during the trial and reflected judgment now that this case, although having more evidentiary questions than any the Court has previously tried, more adversariness than customarily occurs in a normal civil case, and inordinate length of trial time, was well and competently briefed, tried and argued by exceeding competent counsel for both sides. This Court maintained close scrutiny over the progression of this litigation and feels satisfied that the interests of all parties were adequately protected. The argument that conduct of plaintiff's counsel prevented a fair trial in this action is without merit.

The Court also finds no merit to the remaining contentions of defendants, many of which this Court has already ruled and commented upon during the preparation of this case for trial or during the trial itself.

IT IS THEREFORE ORDERED that the motions of defendants for a judgment notwithstanding the verdict or for a new trial are hereby denied.

At Wichita, Kansas, this 16th day of August, 1979.

(s) *Frank G. Theis*
United States District Judge

APPENDIX

THE COURT'S INSTRUCTIONS

INSTRUCTION NO. 1

MEMBERS OF THE JURY:

Now that you have heard the evidence and the arguments, the time has come to instruct you as to the law governing the case.

Although you as jurors are the sole judges of the facts, you are duty bound to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you.

If, in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me and none must be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole, and you are to regard each instruction in the light of all the others.

You are not to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

INSTRUCTION NO. 2

This is an action to recover for alleged personal injuries arising out of the radioactive contamination to which plaintiffs decedent, Karen Silkwood, was exposed in November, 1974. Karen Silkwood was an employee of defendant Kerr-McGee Nuclear Corporation and worked at that defendant's fuel rod fabrication plant — the Cimarron facility. She was exposed to plutonium, a radioactive substance, on three consecutive days — November 5th, 6th and 7th, 1974. Plutonium contamination was found in her apartmen on November 7th.

It is stipulated by the parties that the plutonium that caused Silkwood's contamination originally came from the Cimarron facility, and plaintiff alleges that the operation of a nuclear fuel rod fabrication plant is an ultra-hazardous or abnormally dangerous activity. Plaintiff therefore alleges that Kerr-McGee Nuclear Corporation is strictly liable to compensate plaintiff for his decedent's injuries and damages caused by the escape of this plutonium from the facility. Plaintiff claims that Silkwood suffered injuries, including radioactive contamination of her internal organs, tissues and genes, and that she experienced mental and emotional trauma, suffering and anguish.

Plaintiff also alleges Kerr-McGee Nuclear Corporation was negligent with respect to Karen Silkwood in the following respects:

1. Failure to inform itself of the full extent of the hazardous nature of plutonium.
2. Failure to inform and train its employees regarding the hazardous nature of plutonium.
3. Failure to protect employees and others against hazards created by the escape of plutonium from the plant.
4. Failure to employ an adequate number of trained and qualified health and safety personnel.
5. Failure to employ adequate security procedures, equipment and personnel to prevent escape of plutonium.
6. Failure to take those steps reasonably necessary to avoid contamination incidents, to minimize harm from incidents that did occur, and to account for all plutonium in its possession so that escape of the substance could be immediately detected and prevented.

Plaintiff also alleges that Kerr-McGee Nuclear Corporation is the mere instrumentality or alter ego of its parent corporation, Kerr-McGee Corporation, and that the parent corporation may therefore be held liable for the damages that plaintiff seeks.

Plaintiff claims actual damages in the amount of $1,505,000.00 for actual bodily injury and for injury to property. Plaintiff further claims the conduct of defendant companies was so grossly negligent, malicious, and wantonly reckless toward Silkwood and others as to entitle him to recover $..... in exemplary damages from defendants.

Defendant Kerr-McGee Nuclear Corporation denies that it was negligent in any manner in its operation of the facility, and further denies that any conduct attributable to it caused the escape of plutonium from the facility and the contamination of Karen Silkwood. The Nuclear Corporation further raises an affirmative defense that Silkwood herself intentionally carried the plutonium in question to her apartment and there contaminated herself either inadvertently or intentionally. The Nuclear Corporation therefore denies its liability for any damages allegedly caused to Silkwood.

Defendant Kerr-McGee Corporation denies that the Nuclear Corporation is its alter ego or a mere instrumentality. Kerr-McGee Corporation alleges that the Nuclear Corporation is a separately maintained corporate entity. Kerr-McGee Corporation therefore denies liability for any torts, or wrongs, committed by its subsidiary corporation.

Both defendant corporations deny the nature and extent of all personal damages alleged by plaintiff; except the parties have stipulated that the amount of property damage suffered by plaintiff's decedent from contamination to personal property in her apartment is $5,000.00.

The above and foregoing are the claims of the parties herein, and are not to be construed by you as evidence in the case.

INSTRUCTION NO. 3

The burden is on the plaintiff in a civil action such as this to prove every essential element of his case by a preponderance of the evidence.

Similarly, if you find that plaintiff has proved all elements of his case, then the defendants have the burden to prove by a preponderance of the evidence their affirmative defense of self-contamination.

If the proof fails to establish any essential issue in a case upon which the burden of proof is on the asserting party, then such party must lose on that issue.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. By a fair preponderance of the evidence is not necessarily meant the greater number of witnesses, or the length of the presentation of testimony, but rather, the greater weight of the evidence taken together — that is, that evidence upon any question or issue which convinces you most strongly of its truthfulness. If the evidence on an issue is equally balanced, then there is no preponderance and the party having the burden to establish that issue must fail.

INSTRUCTION NO. 5

Burden of proof means burden of persuasion. A party who has the burden of proof on an issue must persuade you that his claim regarding that issue is more probably true than not true. In determining whether he has met this burden you will consider all the evidence, whether produced by plaintiff or defendants.

For plaintiff to recover against Kerr-McGee Nuclear Corporation, the burden of proof is on the plaintiff to establish the three elements of his case as listed in Instruction No. 7.

For plaintiff to recover against Kerr-McGee Corporation, plaintiff has the burden of proof to establish these same three elements. Additionally, plaintiff has the burden of proof to establish that Kerr-McGee Nuclear Corporation is the instrumentality of its parent corporation, as defined in a separate instruction.

Finally, the plaintiff has the burden of proof to establish the nature and/or extent of the claimed personal injuries and property damage to plaintiff's decedent, and generally the amount of actual and punitive damages, subject to your final power to determine the amount of dollar damages in one or both categories of damages.

If you find these elements established, then the burden of proof is on defendant Kerr-McGee Nuclear Corporation to establish that Karen Silkwood took the plutonium from work to her apartment where she was allegedly injured.

INSTRUCTION NO. 6

You are instructed that plaintiff is relying in this case on a theory of liability against defendants that is known as strict liability. Such theory of liability is one that comes about by operation of law through public policy for the protection of people who live in a society where they may be affected by someone else's operation of an ultra-hazardous or abnormally dangerous activity.

The rule of strict liability applies only to harm that is within the scope of the abnormal risk that is the basis of the liability. The liability arises out of the abnormal danger of the activity itself and the risk it creates of harm to those in the vicinity. In the case at bar the activity would be the handling and processing of plutonium, one of the most dangerous of substances. The rule is founded upon a policy of law that imposes upon anyone, who for his own purpose creates an abnormal risk of harm to his neighbors, the responsibility of relief against that harm when it does in fact occur. The defendants' enterprise, in other words, is re-

quired to pay its way by compensating for the harm it causes because of its special, abnormal and dangerous character. The liability is not in any way based upon any intent of the defendant to do harm to the plaintiff or to affect his interest — nor is it based upon any negligence either in attempting to carry out the activity itself in the first instance, or in the manner in which it is carried on. The defendant is held liable although he has exercised the utmost care to prevent the harm to the plaintiff that has ensued from the dangerous substance.

INSTRUCTION NO. 7

You are instructed that the Court finds as a matter of law that the operation of the Cimarron facility by defendant Kerr-McGee Nuclear Corporation constitutes an abnormally dangerous activity. Therefore, if you find that the damage to the person or property of Karen Silkwood resulted from the operation of this plant — if that damage was caused by the escape of plutonium from that plant — then defendant Kerr-McGee Nuclear Corporation is liable for this damage, unless defendant prevails on its affirmative defense set forth below.

As the elements of his case then, plaintiff must establish by the evidence:

1. That plutonium escaped from the custody of the Kerr-McGee Nuclear Corporation's Cimarron facility;

2. The plutonium that so escaped caused Karen Silkwood actual injuries to her person or property; and

3. The nature and extent of the injuries.

As stated in the stipulation of fact, element number 1 above has been agreed to and admitted by the parties, leaving only elements 2 and 3 to be established by the evidence.

Once these facts are established, liability for this injury exists. This is true without regard to the degree of care with which defendant Kerr-McGee Nuclear Corporation carried on its activities at the Cimarron facility.

The liability of defendants, or either of them, under the doctrine of strict liability, is, of course, subject to the jury's determination of the self-contamination defense of Kerr-McGee as set forth in the following paragraph.

You are further instructed that a verdict for both defendants must result if Kerr-McGee Nuclear Corporation has proved by a preponderance of the evidence its affirmative defense that Silkwood intentionally removed plutonium from the Cimarron facility, and as a result thereof negligently or intentionally contaminated herself.

INSTRUCTION NO. 8

The fact that plaintiff's legal theory of liability or recovery against defendants Kerr-McGee Corporation and Kerr-McGee Nuclear Corporation is in legal parlance or language referred to as "strict liability," does not mean in any sense that plaintiff can recover because he files a lawsuit and claims strict liability as the basis of his legal theory.

INSTRUCTION NO. 9

The plaintiff's other claim of liability of the defendants in this case is negligence.

As used in these instructions, negligence is the lack of that degree of care as would be exercised by a very careful, prudent and competent person under the same or similar circumstances. It is the failure of a person to do something that a very careful or prudent person would do, or the act of a person in doing something that a very careful or prudent person would not do, measured by all the circumstances then existing.

To constitute actionable negligence three elements are necessary and must concur. First, the existence of a duty on the part of the party charged; second, failure of said party to perform that duty; and third, injury to the party charging the negligence and which proximately results from such failure.

A proximate cause of an injury is a cause which in direct, unbroken sequence produced the injury. It is one without which the injury would not have occurred.

Because the operation of the Cimarron facility by the defendant Kerr-McGee Nuclear Corporation constitutes an abnormally dangerous activity, a duty of utmost due care is placed upon Kerr-Mcee Nuclear Corporation by the law.

By "utmost due care" the law means that the defendant is required to exercise a degree of caution that corresponds to the riskiness of the activity. For an abnormally dangerous activity every known foreseeable precaution must be taken.

In the context of the evidence in this case on the issue of negligence, you may find that escape of plutonium from the Cimarron plant caused Karen Silkwood's injury, without finding that it was specifically foreseeable that Karen Silkwood in particular would be injured by an escape of plutonium. It is enough for proximate cause for you to find that it was foreseeable that the escaped plutonium would injure anyone who would be exposed to it.

INSTRUCTION NO. 10

Evidence has been admitted in this case regarding the existence of government standards for the operation of the Cimarron facility and the accounting for plutonium within the facility. You are instructed that these standards may be considered by you as evidence of expert opinion on what constitutes reasonable care on the part of defendant Kerr-McGee Nuclear Corporation. You may consider this evidence as any other expert testimony and it is to be

tried by the same tests. It should receive such weight and credit as you, the jury, deem it entitled, when viewed in connection with all the other facts and circumstances of the case. Its weight and value are questions for you to decide.

You may consider compliance with these standards as evidence of the exercise of reasonable care by Kerr-McGee Nuclear Corporation and to negative a finding of the conduct necessary to establish a basis for exemplary damages. Failure to comply with these standards, however, may be considered by you as negligence per se, that is, such conduct in and of itself shall be considered by you as negligence, or the failure to exercise reasonable care. Either a single incident of gross and/or wanton disregard, or a series of acts of negligence, per se, may also be considered in judging conduct necessary to impose exemplary damages.

You are instructed, however, that you are not bound by these standards. Your duty is to determine what constitutes the exercise of reasonable care in handling plutonium, or the existence of reckless and wanton conduct, in light of the physical characteristics of that material and the risks associated with it.

INSTRUCTION NO. 11

Evidence has been admitted in this case regarding the existence of government standards for the acceptable levels of exposure to radiation permitted in such facilities in regard to plant safety and evaluation of the nature and extent of personal injury. You are instructed that these standards may be considered by you as evidence of expert scientific and medical opinions on what levels of exposures may result in actual physical injuries, of whatever severity, to persons who work in such facilities. You may consider this evidence as any other expert opinion, and you should give it such weight and credit to which you deem it entitled, when viewed in connection with all other facts and circumstances.

You are instructed, however, that you are not bound by these standards. Compliance with such standards does not necessarily mean injury cannot occur for which liability may be imposed. Your duty is to determine according to your own best judgment, in light of all the evidence, the nature and extent of the actual injuries suffered by Karen Silkwood, if any, and the emotional suffering and anguish proximately caused thereby, if any.

INSTRUCTION NO. 12

One of the defendants' principal contentions and defense in this case to both negligent conduct or conduct meriting an award of exemplary damages is that Kerr-McGee Nuclear Corporation has always, and in particular at the time of events in this case, been in substantial compliance with its license and AEC regulations pertaining to its Cimarron plant.

You are instructed that substantial compliance with the license conditions imposed by the Atomic Energy Commission in the defendants' license and the regulations of the Atomic Energy Commission as they pertain to Karen Silkwood and her exposure to plutonium on November 5, 6 and 7, 1974, may be considered by you in determining whether or not the defendant, Kerr-McGee Nuclear Corporation was negligent in its plant operations, directly causing the claimed injuries to Silkwood. You may further consider compliance or substantial compliance in determining whether exemplary damages should be awardable against the defendants, or either of them, and the amount thereof.

As stated before in these instructions on the effect of government standards, such compliance would not necessarily preclude a finding of blameworthy conduct under all the facts and circumstances shown by the evidence.

[APPENDIX]

INSTRUCTION NO. 13

Plaintiff was permitted in his case in chief to present evidence of several statements of Karen Silkwood and evidence relating to her activities from September to November, 1974. This evidence was admitted primarily through the testimony of Jean Jung, whose deposition was read to you, the testimony of union officials Steven Wodka and Tony Mazzochi, and the playing of certain tape recordings of Karen Silkwood's conversations and scientific lectures that Silkwood attended. Slides of Silkwood's notebooks containing her observations of events and conditions at the Cimarron facility were displayed, and the original notebooks were admitted as exhibits for you to examine.

The evidence was comprised of Silkwood's statements to AEC investigators, union officials, and her own allegations of unsafe working conditions at the plant, and purported falsification of quality assurance records for fuel rod manufactured at the plant. It was not admitted to prove, and must *not* be considered by you as evidence of the conditions or events at the Cimarron facility they purport to describe. The truth or falsity of Silkwood's allegations or charges is not in issue in this case.

This evidence was introduced solely to show Silkwood's knowledge and state of mind at the time the statements were made or the events transpired. This evidence must be considered by you solely in this regard.

Substantive evidence of conditions at the facility was presented by plaintiff through other evidence — witnesses who testified first hand as to what they observed at the plant or knew of their own knowledge and through official records of the facility that reflect actual events or conditions at the plant. You the jury must rely solely on that evidence and the evidence of the defendants that may rebut or contradict it, to resolve the issue before you of whether plutonium escaped from the facility by reason of the negligence of defendant Kerr-McGee Nuclear Corporation, and thereby injured Silkwood.

The evidence of Silkwood's statements and allegations is before you solely for your consideration regarding Nuclear Corporation's affirmative defense in this case. Both defendants contend that Silkwood intentionally removed plutonium from the Cimarron facility to contaminate urine samples she voided at home. As indicated elsewhere in these instructions, the burden is on the defendants to prove this fact by a preponderance of the evidence. The above-mentioned evidence may be considered by you in your determination of Silkwood's state of mind, motivation or intention to aid you in deciding whether or not Silkwood intentionally removed plutonium from the facility. In this regard, it is not material whether Silkwood's statements, allegations and beliefs were, in fact, true or false. What Silkwood believed and felt was true, however, is material in your determination of her motivation and intentions that might lead to certain conduct. This evidence is admitted solely for your consideration of Silkwood's state of mind or intentions, to aid you in determining whether it is likelier than not that Silkwood intentionally removed plutonium from the facility.

INSTRUCTION NO. 14

The Court has admitted certain evidence in this case to show motivation, the intent or the credibility of various parties. Among these is plaintiff's Exhibit 307 — a list of questions submitted by Kerr-McGee Nuclear Corporation to its Cimarron facility employees on or about late December, 1974, and early January, 1975. This exhibit has been admitted for the sole purpose of showing Kerr-McGee Nuclear Corporation's state of mind as to its employees, their association with the Oil, Chemical and Atomic Workers Union, and problems arising out of its plant operations prior to that time, and particularly in the last half of the year 1974. You are to consider this exhibit for no other purpose.

[APPENDIX]

INSTRUCTION NO. 14a

The Court reminds you that plaintiff's Exhibits 87, 93, 97, 99 and 114 were admitted, even though they constitute hearsay, as providing background information pertinent to the Oil, Chemical and Atomic Workers Union's activities and interest in the Cimarron facility, and they are not to be considered as evidence of the truth of the matters set forth in the exhibits.

INSTRUCTION NO. 15

The plaintiff in this action was permitted to demonstrate in his case in chief evidence of incidents at the Cimarron facility occurring prior to the death of Karen Silkwood that might show or tend to show the alleged careless or negligent behavior on the part of the defendants or their employees in operation of the plant. You, the jury, are instructed that this evidence was admitted for the purpose of determining Kerr-McGee Nuclear Corporation's knowledge of, and attitude toward, any alleged defective, unsafe or hazardous working conditions in the plant. You may consider such incidents and such knowledge, if any, in your determination of whether to award plaintiff punitive damages against the defendants, as elsewhere instructed. This evidence was also admitted to aid you in deciding whether it is more likely than not that negligent conduct of either defendant caused the escape of plutonium from the Cimarron facility and thereby caused, or contributed to cause, Karen Silkwood's injuries, if any.

Evidence of incidents in the plant occurring after Silkwood's death was also admitted which might show or tend to show alleged careless or negligent conduct on the part of the defendants or their employees in plant operation. You are instructed that this evidence was admitted solely for the limited purpose of establishing whether a course of conduct existed on the part of the defendants, prior to Silkwood's death and continuing for some time thereafter, from

which an inference might be drawn that conditions existed at the Cimarron facility in November, 1974, that might cause or contribute to cause the escape of plutonium that caused Silkwood's injuries, if any. As with any testimony in this case, you may find it either believable or not, or give it whatever weight you desire. It was admitted solely to aid you in your determination of whether either defendant is liable for injuries to Karen Silkwood, if any, as instructed above.

Such evidence of incidents occurring after the contamination of Silkwood must not be considered by you in assessing the nature and extent of any conduct of Kerr-McGee for which you might determine punitive damages to be awardable in this case.

INSTRUCTION NO. 16

You are instructed that Kerr-McGee Corporation is liable for the damage to the person and property of Karen Silkwood resulting from the activities of the Kerr-McGee Nuclear Corporation at the Cimarron Plutonium Plant if you find that Kerr-McGee Corporation so dominated the management, policies, and finances of the Kerr-McGee Nuclear Corporation so that that corporation had no actual will or existence of its own but was only a mere instrumentality of Kerr-McGee Corporation.

In considering the relationship between Kerr-McGee Corporation and Kerr-McGee Nuclear Corporation, you should consider the evidence presented to you in the light of the following factors:

1. The ownership of stock of Kerr-McGee Nuclear Corporation by Kerr-McGee Corporation.
2. The presence on both corporations of the same officers or directors, if any.
3. The financial support, if any, of the Kerr-McGee Nuclear Corporation's operations by Kerr-McGee Corporation.

4. The underwriting of the incorporation and purchase of the capital stock of Kerr-McGee Nuclear Corporation by the parent corporation, Kerr-McGee Corporation.
5. The joint accounting and payroll system, if any.
6. The substantial business contacts and assets, if any, given by the parent corporation to the subsidiary.
7. The control of the nuclear corporation, if any, by the parent corporation.
8. The method of handling the financial statements of the subsidiary in relation to the parent, showing that the subsidiary was treated as a mere part of the parent corporation.
9. Whether Kerr-McGee Nuclear Corporation subsidiary was organized with a grossly inadequate capital structure.
10. Whether the property of the Nuclear Corporation subsidiary is used by the parent, Kerr-McGee Corporation, as its own.
11. Whether the individuals who exercise operating control over the Kerr-McGee Nuclear Corporation subsidiary exercise it in the interest of the parent, Kerr-McGee Corporation.
12. Whether there was a failure to observe the formal requirements attributable to the operations of a subsidiary.

These and other factors may be considered by you in arriving at your conclusion as to whether Kerr-McGee Nuclear Corporation was an independent corporation on the one hand or a mere instrumentality or alter ego of the parent corporation on the other. If you find that the Nuclear Corporation was a mere controlled extension or instrumentality of the parent Kerr-McGee Corporation, then if Nuclear Corporation is liable for any damages in this case, both corporations become equally liable.

If, however, you find that the plaintiff has not proved the above, then you must so indicate on the verdict form. This results in a verdict in favor of Kerr-McGee Corporation, regardless of your decision as to plaintiff's case against Kerr-McGee Nuclear Corporation.

INSTRUCTION NO. 17

At the beginning of this case both the Court and counsel for both parties told you that plaintiff was asking for $1,500,000 actual damages, and the amount of $10,000,000 exemplary or punitive damages, for the injuries alleged to have been inflicted upon Karen Silkwood by defendants. You were questioned by the Court and counsel on your reaction to such amounts of the prayer.

During the course of this trial plaintiff has asked the Court to allow him to amend his complaint to permit plaintiff to recover a larger amount, namely $70,000,000 total, for exemplary or punitive damages.

Federal rules require the Court to liberally allow such dollar amount amendments. Such requests for damages largely reflect the parties' or the lawyers' desires or opinions on what they want to recover. The Court has withheld any action upon plaintiff's last request because the federal rules also provide that the jury is not bound in any way by the plaintiff's request and may, under the evidence, allow a lesser or greater amount than any request or prayer for damages that a plaintiff may have made. In final essence, amounts of damages must be determined upon the jury's fair and impartial assessment of the evidence in their individual and collective judgments.

INSTRUCTION NO. 18

You are instructed that if you find, under the instructions previously given, that either or both defendants are liable to the estate of Karen Silkwood for any injuries and/or property damage suffered by her prior to her death, then it is your duty to award actual damages.

You are instructed that if you find from a preponderance of the evidence that prior to her death Karen Silkwood suffered any mental pain or anguish by reason of any physical injury suffered, then plaintiff is entitled to recover for the benefit of her estate such sum as you, after a full and fair consideration of all the evidence in this case, shall deem to be a reasonable and fair compensation for such mental anguish and physical pain suffered by Karen Silkwood by reason of her injuries. To award damages for mental anguish and emotional suffering, you must first find by a preponderance of the evidence that Karen Silkwood sustained physical injury from her exposure to plutonium on November 5, 6 and 7, 1974, and that any mental anguish and emotional suffering was proximately caused by such physical injury.

Your verdict for actual damages must include $5,000.00 as the value stipulated by the parties to compensate for property owned by Silkwood on November 7, 1974, and removed from her apartment because of contamination.

Your are further instructed that damages to Silkwood, if any, are limited to those which began on November 5, 1974, and ceased with her death. You are not to consider her death in awarding damages in this action. No damages may be awarded for any injury or physical or mental conditions, if any, which existed prior to November 5, 1974. Nor may you award damages for injuries, if any, that Silkwood would have sustained had she lived beyond November 13, 1974.

In arriving at the amount of your verdict you should consider plaintiff's age, condition of health before and after, and the nature, extent and duration of her injuries. For such items as pain, suffering and mental anguish there is no unit value and no mathematical formula the Court can give you. In this regard you are instructed that no witness is required to testify as to the amount of damages resulting from physical or mental and emotional pain and suf-

fering. Such proof is not required in a court of law. Instead, you, as jurors, are entitled to use your own judgment in arriving at a sum which will fairly and adequately compensate for such pain and anguish. The amount to be awarded rests within your sound discretion.

COURT'S NOTE:

During the deliberations of the jury the Court received the following written communication from the jury relative to the meaning of phraseology in an instruction — specifically No. 18. The Court replied with the following supplemental instruction, which is given the designation of Instruction No. 18(a).

INSTRUCTION NO. 18(a)

The Court has received the following written communication from the jury:

> "In Instruction # 18, what does physical injury mean?"

In answer to your question, you are invited to review and consider the total evidence in this regard.

Certainly physical injury can include a non-visible or non-detectable injury, and may include injury to bone, tissue, or cells. If a person has suffered physical injury under (on the basis of) expert medical opinion, it is only necessary that a person believe he or she has been physically injured as a basis for mental pain and suffering to occur. It has been admitted in this case by both parties and their expert medical witnesses that radiation had occurred to Ms. Silkwood from plutonium through the impact of alpha particles in her body. The witnesses, however, disagreed on whether or when physical injury occurred and, if so, its nature and extent.

The individual recollection of each juror, and your collective recollection, is invited to a mental review of this

evidence. The evidence is too comprehensive, from too many witnesses, and is scattered through the many weeks' record in this case. It would be impossible for the reporter to ascertain or read from the record all the evidence on this issue which he would be required to do if this were possible at this time.

INSTRUCTION NO. 19

If you find for the plaintiff for actual damages to Karen Silkwood, you must then consider whether to award exemplary or punitive damages to the plaintiff. In any action like the one before you, the jury may give damages for the sake of example and by way of punishment, if the jury finds the defendant or defendants have been guilty of oppression, fraud, or malice, actual or presumed. These damages are called in legal parlance exemplary or punitive damages.

The basis for allowance of punitive damages rests upon the principle that they are allowed as a punishment to the offender for the general benefit of society, both as a restraint upon the transgressor and as a warning and example to deter the commission of like offenses in the future.

Exemplary damages are not limited to cases where there is direct evidence of fraud, malice or gross negligence. They may be allowed when there is evidence of such recklessness and wanton disregard of another's rights that malice and evil intent will be inferred. If a defendant is grossly and wantonly reckless in exposing others to dangers, the law holds him to have intended the natural consequences of his acts, and treats him as guilty of a wilful wrong.

To constitute wilful or wanton negligence sufficient to justify an award of punitive damages, it is not necessary that there exist ill will toward the person injured, or specific intent to inflict the injury. If an act that caused harm

to plaintiff's decedent was the result of, or accompanied with, such gross negligence or reckless disregard of another's rights, manifesting an indifference to the consequences of the act, so that malice may be inferred, then an award of exemplary damages is appropriate.

If you find that the conduct of defendant Kerr-McGee Nuclear Corporation, if any, that caused or contributed to cause, Silkwood's alleged injuries, fits within this definition, you may award exemplary damages against that defendant. Any exemplary damages that you award must bear some relationship to the injuries inflicted, but need not bear any relation to the amount of actual damages awarded.

You may consider the financial worth of the defendant against whom such damages are awarded in determining the size of such an award that is proper under the facts of this case. That is, you may consider the wealth of defendant Kerr-McGee Nuclear Corporation in determining what amount of exemplary damages, if you find them appropriate, is consistent with the general purpose of such an award in deterring the defendant, and others like it, from committing similar acts in the future, and for punishment of the defendant for such acts.

If you have found by a preponderance of the evidence that Kerr-McGee Nuclear Corporation is the mere alter ego of Kerr-McGee Corporation, as elsewhere instructed, then you may consider the combined wealth of both corporations in determining the appropriate size of any such award.

INSTRUCTION NO. 20

In the verdict form, the Court will submit to you several interrogatories or questions. You are to return to court with your answers to these questions, instead of with a general verdict where you, the jury, would simply decide

either for the plaintiff or the defendants. Thereafter, and upon the basis of your answers, the Court will enter a judgment for the appropriate party.

These questions represent to you the individual issues presented in this case. They are listed in the order and the manner in which you must address them. The issues before you, as represented by these questions, and the law that controls them, are explained in these instructions.

The first question you must decide represents the affirmative defense of the Kerr-McGee defendants. You must determine whether the defendants have proved by a preponderance of the evidence that Karen Silkwood intentionally removed from work to her apartment the plutonium that caused her contamination on November 5th, 6th and 7th, 1974, for which this lawsuit is brought. The defendants have the burden of proof on this issue. "Preponderance of the evidence" is explained in one of the foregoing instructions, but it essentially means that something is more likely true than not true.

Thus if you believe that the evidence has established that it is more likely true than not that Karen Silkwood intentionally removed plutonium from the Cimarron facility, you must answer this question "yes." If, however, you find the weight or value of the evidence is to the contrary, or does not convince you either way, so that you cannot affirmatively find that her intentional removal of plutonium is any more likely than not, then you must answer "no" to this question.

A finding that Karen Silkwood intentionally removed plutonium from the facility results in a verdict for both defendants, and you must not answer any further questions. Thus, if you answer the first question "yes," you should so indicate on the verdict form and return it to the Court. You must not continue to answer further questions. A finding to the contrary, or a "no" answer to the first question, requires that you continue to answer the remaining questions.

A "no" answer to the first question results in the imposition of liability of Kerr-McGee Nuclear Corporation because of the legal doctrine of strict liability that controls this case. If you cannot find that Silkwood intentionally carried from work to her apartment the plutonium that caused her contamination, it is unnecessary for you to decide how plutonium escaped from the plant, how it entered her apartment, or how it caused her contamination, since it is a stipulated fact that the plutonium in Silkwood's apartment was from a defendant's plant.

The second question represents plaintiff's alternative theory for liability. It requires you to decide whether any negligence on the part of defendant Kerr-McGee Nuclear Corporation in the operation of the Cimarron facility caused or allowed the escape from that facility of the plutonium that contaminated Silkwood. Instructions on negligence have been presented in the body of these instructions. The Burden of proof on this issue, as stated elsewhere, is on the plaintiff.

The third question asks you to decide the amount of actual damages suffered by plaintiff's decedent, Karen Silkwood. An instruction defining what you should consider in reaching this determination is found in the foregoing instructions. This figure must include the amount of $5,000.00 for damages to property caused by plutonium contamination that has been stipulated by the parties. Any additional amount must reflect your dollar valuation of actual injuries to Silkwood's person, and any suffering and anguish caused thereby. The burden of proof on the nature and extent of damage remains on the plaintiff.

The fourth question requires that you decide whether defendant Kerr-McGee Nuclear Corporation is the mere instrumentality of its parent corporation, defendant Kerr-McGee Corporation. The factors that you must consider are listed in a prior instruction. The burden of proof on this issue is on the plaintiff.

The fifth and last question permits you to award exemplary damages against the defendant or defendants and in favor of the plaintiff. The nature and purpose of exemplary damages are explained in a separate instruction. Whether an award of exemplary damages is appropriate, and if so, what amount that award should be, is a matter for you to decide in light of the law given you in that instruction and all the evidence before you. The plaintiff has the burden of proof on this issue.

As you have learned in that instruction, you may consider the financial worth of the defendants as one factor in determining the amount of any such award. However, if you have answered "no" to question four above — if you find that the Nuclear Corporation subsidiary is not the instrumentality of its parent, Kerr-McGee Corporation — then you may only consider the financial worth of defendant Kerr-McGee Nuclear Corporation, and not the two corporations combined, in determining the amount that is appropriate. If your answer to question four is "yes," you may consider the combined worth of both defendants in determining the amount of such an award.

INSTRUCTION NO. 21

You are instructed that a corporation is entitled to the same fair and unprejudiced treatment and consideration as an individual under like circumstances. A corporation can act only through its officers and employees, and the conduct of an officer or employee of a corporation is the conduct of the corporation.

INSTRUCTION NO. 22

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence — such as the testimony of an eye witness. The other is indirect or circumstantial evidence — the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

INSTRUCTION NO. 23

Certain testimony has been given in this case by experts — that is, by persons who are specially qualified by experience or training and possess knowledge on matters not common to mankind in general. The law permits such persons to give their opinions regarding such matters. The testimony of experts is to be considered like any other testimony and is to be tried by the same tests, and should receive such weight and credit as the jury deems it entitled to, when viewed in connection with all the other facts and circumstances, and its weight and value are questions for the jury.

INSTRUCTION NO. 24

During the trial of a case certain testimony may be read to you by way of deposition. The testimony of a witness who for some reason cannot be present to testify from the witness stand is usually presented in writing under oath in the form of a deposition. Such testimony is entitled to the same consideration and, insofar as possible, is to be judged as to credibility and weighed by the jury in the same way as if the witness had been present.

Sometimes, as in this case, a deposition may be used in the sense of showing a prior statement is purportedly inconsistent with in-court testimony of the witness. The jury may take it as a fact that the deposition testimony admitted by the Court accurately reflects what the witness said at the time the deposition was taken.

[APPENDIX]

INSTRUCTION NO. 27

At some risk of over-explaining these instructions, but with the intent of the Court to place some of the evidence in this case in perspective in relation to the issues of the case, the Court gives you this instruction, which is somewhat in the nature of a legal commentary on the total scope of the instructions in the jury's use of them as legal guides in their deliberations.

You will recall that the evidence in the case began with evidence on behalf of the plaintiff that the chemical substance or element of plutonium was one of the most toxic and dangerous substances ever to confront man, and that it was a man-made element. This evidence was admitted to show the ultra-hazardous or extremely dangerous nature of the substance and the operation of a plant in either the fabrication of nuclear materials or for use as a source of energy, and to ultimately indicate a sound basis required by the public interest for the application of the legal doctrine of strict liability, one of the plaintiff's claimed legal bases of recovery on the one hand, or the duty or obligation of individual persons or corporations engaged in the nuclear industry to use the highest or utmost degree of care in running their plants under the plaintiff's second theory of liability — which is negligence.

It follows then, that the danger of the substance and in its fabrication or use, and the indication of the highest degree of care by the handler of the substance, sets the parameters of a handler's conduct in the running of its plant which may open the door wider to imposition of exemplary or punitive damages. To keep other handlers within the high care limitations and thus deter any repeated or future occurrence of such conduct showing a lesser degree of care, you may want to consider circumstances between judging individual and corporate conduct. While your legal duty is to use the same standards of judgment of conduct on both an individual and a corpo-

ration which, as has been explained to you, is an artificial legal person, your common sense may allow you to find that the individual is guided by his own action, conscience and thoughts, while a corporation is a group of persons, small or large, associated together to accomplish the corporate purpose whose actions or conduct can only be judged by how management and employees do their job, whose collective conscience or mental attitude may be illusive, and certainly different than religious, moral, philosophic, and knowledgeable currents that exist in a human mind and determine conscious human activity or good conscience.

Punitive damages in the last analysis, involve the element of bad thought, lax conscience, or "don't care" attitude, as more fully explained in the exemplary damage instruction. Government regulations of a governmental agency on conduct in a given field, are to keep something in social bounds as determined by the people who constitute government at legislative or executive levels. As indicated in other instructions, these regulations are based on the government's views of the best scientific and technical knowledge available at the time of their issuance or promulgation. Thus, in a democracy such as ours where the government responds to citizens' desires through the elective process, such regulations therefore can be deemed to reflect a broad base of citizen approval and as such are entitled to a high degree of respect and belief. On the other hand, you as jurors, and as fact finders in a trial in our judicial system, have the duty of finding truth under the evidence. In this context, and as explained in previous instructions, such regulations do not have to be accepted by you as right or accurate if they defy human credence, are questionable under best scientific knowledge, or can be shown not to accomplish their intended purpose.

In this case one of the defendants' defenses is "substantial compliance" with the regulations regulating the nuclear industry and the Kerr-McGee nuclear plant in particular. Compliance itself is a broad term implying two

things: one, that the conduct of the one complying was in complete accord with the standards of the regulations; and two, that there was adequate inspection and enforcement by the agency supervising the regulation to accurately determine the complier's conduct would amount to or constitute compliance. The defendants are not themselves claiming full compliance in this case.

The phrase, or the words "substantial compliance" therefore, is something less than compliance, and perhaps is confused by flexibility in meaning of the word "substantial," but still suggests in the light of common sense that most or a very large amount of the requirements dictated by the regulations had been done. Thus, corporate conduct of compliance with these regulations is entitled to the strongest and probably conclusive consideration by a jury as negativing or proving lack of bad conduct necessary to base punitive damages, unless the total evidence convinced the jury either that the regulations were not sound or true when measured by the weight of the scientific knowledge, or that the conduct was actually in violation of the regulations, or that the enforcement agency did not actually enforce, or that the person against whom a particular regulation was to apply knew or should have known that it would not accomplish its intended purpose. On the other hand, "substantial compliance" being less than compliance itself, would indicate that strong consideration be given by you that a complier's conduct was not in the punitive category unless you find one or more of the above limiting factors to be applicable. You may also consider in determining substantial compliance what conduct in a dangerous instrumentality such as the Kerr-McGee nuclear plant was not covered by regulations and which you determine would violate a reasonable man's standard of due care as should be applied in such circumstances.

Neither side of this case has advised the Court nor introduced evidence before the jury identifying or pointing out all the specific regulations relied on as relevant to con-

tentions of either compliance or noncompliance, or as to further explain the phrase "substantial compliance."

The total regulations of the Atomic Energy Commission (AEC), which was the regulatory body at the time of the events of the Silkwood contamination and prior thereto, are too numerous for production for this jury, although the content of certain regulations has been introduced in evidence or been testified about before the jury. Also, the voluminous license of the Kerr-McGee nuclear plant has been introduced in evidence before the jury. Likewise, many AEC regulation and license conditions are outside the scope of contentions in this trial, and compliance with them would not be any kind of shield against finding of any degree of negligent conduct. Those in the health and safety areas are the regulations to be focused upon by the jury in the light of the evidence and the statements of counsel.

The testimony and statements of counsel agree that the regulations of nuclear plant regulation have changed little between November 9, 1974, and the time frame of this trial. It is therefore most important that the jury always remember that in judging health and safety standards in the regulations that they are bound by what was known in scientific circles of the world and this country in 1974 and prior thereto, and not upon changes in scientific opinion that occurred after 1974.

INSTRUCTION NO. 28

On numerous occasions during the course of this trial the Court has admonished you to refrain from reading or listening to any of the many media accounts focusing on the national debate on the relative wisdom and safety of nuclear development. During selection of the jury for this case, the Court asked each of you whether you had any preconceived ideas or feelings on the subject of nuclear energy. On the basis of your answers, and in reliance on your sworn oath to abide by the Court's admonitions, this Court and the parties before you have faith that you can

decide the instant questions fairly, and without bias or influence from any public information, commentary, or opinion on this case or on issues not presented by it.

The issues in this case have been explained to you in these instructions. The sole evidence upon which you must rely in resolving them has been presented to you in this courtroom. In reaching your determinations, you are not to take into consideration any aspect of the public debate on the controversy over nuclear power. Your resolution of this case must solely relate to events and circumstances that occurred in the Cimarron facility that relate to the injuries to Karen Silkwood, if any, in light of the dangerousness of that facility activity. You must not intend the consequences of your verdict to reach beyond these facts, nor to play any role in the resolution of the public inquiry into the wisdom of nuclear development.

Your consideration of whether to award punitive damages in this case, if your findings bring you to that issue, may include the decision on what amount of award would be appropriate to deter these defendants, and others like them, from engaging in acts similar to those you have found in this case to be blameworthy, if any, according to these instructions. In this sense, your verdict may, if you find it appropriate, include damages intended as an example to others not before you, wherever they be, in connection with conduct like that evidenced in this case.

In final essence, your verdict must not be based upon any intention to encourage or discourage conduct not within the parameters of this case.

INSTRUCTION NO. 29

The Court has made certain rulings in the conduct of the trial, and particularly with reference to the admission of evidence. In so doing, the Court has not expressed or intimated in any way the weight or credit to be given any evidence or testimony admitted during the trial, nor indi-

cated in any way the conclusions to be reached by you in this case.

In this Court, it is entirely proper for the Judge, if he so desires, to comment on the evidence and express an opinion thereon to the jury. I am not going to do that in this case. I feel that this jury is fully capable of deciding the true facts in this case and applying the applicable rules of law to those true facts. If there is anything that I have said or done that might seem to indicate to you how I would decide this case, I instruct you to disregard the same and use your own judgment in arriving at your verdict in this case.

Also, I instruct you that while it is the duty and right of counsel to address you and to explain the testimony to enable you better to understand the questions which you are to decide, yet if counsel inadvertently mistake the law or mistake the evidence, you will follow the law as given to you by the Court in these instructions and not as stated by counsel, and you will take the evidence detailed by the witnesses and shown by the documents introduced instead of the statements of counsel.

In this connection, while I am on the subject of lawyers, you should use particular care not to mix your individual thought or reaction to the personality or trial tactics of the lawyers on either side with the merits of the lawsuit based on the issues of law and the evidence presented here in court.

You are the judges of the facts, the weight of the evidence, and the credibility of the witnesses. In determining such weight or credit, you may consider the interest, if any, which a witness may have in the result of the trial, the relation of the witness to the parties, the bias or prejudice, if any has been apparent, the candor, fairness, intelligence and demeanor of the witness, the ability of the witness to remember and relate past occurrences, and means of observation and his opportunity of knowing the

matters about which the witness has testified. If you find that any witness has willfully testified falsely concerning any material matter, you have a right to distrust the testimony of that witness in other matters, and you may reject all or part of the testimony of that witness, or you may give it such weight or credibility as you think it deserves.

From all the facts and circumstances appearing in evidence and coming to your observation during the trial, and aided by the knowledge which you each possess in common with other persons, you will reach your conclusions. You should not let sympathy, sentiment or prejudice enter into your deliberations, but you should discharge your duties as jurors in an impartial, conscientious and faithful manner under your oaths and return such verdict as the evidence warrants when measured by these instructions. These instructions contain all the law, whether statutory or otherwise, which may be applied by you in this case and the rules by which you should weigh the evidence and determine the facts in issue. You must consider the instructions as a whole and not a part to the exclusion of the rest. You will not use any method of chance in arriving at a verdict, but base it on the judgment of each juror concurring therein.

Upon retiring to the jury room, you will select one of your number to act as foreperson. Thereafter, such person will preside over your deliberations and be your spokesperson in court.

A verdict form has been prepared for your use in this case in accordance with your duty under these instructions. I think the proper use of this form in reporting your verdict will be obvious to you; but should you desire any further help in deciding how to use the form, please advise the Court through your baliff.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the bailiff. But bear in mind that you are not to reveal to the

Court or any person how the jury stands, numerically or otherwise, on this matter.

* * * *

The bailiff will come forward to be sworn.

VERDICT

We, the jury in the above entitled case, duly impaneled and sworn upon our oaths, answer the questions submitted to us as follows:

1. Do you find by a preponderance of the evidence that Karen Silkwood intentionally — that is, knowingly and consciously — carried from work to her apartment the plutonium that caused her contamination?

Yes ☐ No ☐

[If your answer to Question No. 1 is "Yes," do not answer any further questions and return to report this to the Court. If your answer is "No," then you must answer the remaining questions.]

2. Do you find by a preponderance of the evidence that Kerr-McGee Nuclear Corporation was negligent in its operation of the Cimarron facility so as to allow the escape of the plutonium from the facility and proximately cause the contamination of Karen Silkwood?

Yes ☐ No ☐

[If you have answered Question No. 2, then you must continue on to Question No. 3.]

3. Enter the amount of actual damages, as defined in the Court's instructions, that you find Karen Silkwood suffered.

$_____.

[If you have answered Question No. 3, then you must continue on to Question No. 4.]

4. Do you find by a preponderance of the evidence that Kerr-McGee Nuclear Corporation is the mere instrumentality of the parent corporation, Kerr-McGee Corporation?

Yes ☐ No ☐

[If you have answered Question No. 4, then you must continue on to Question No. 5.]

5. If you find that an award of exemplary damages is appropriate, as defined in the Court's instructions, enter the amount of exemplary damages that you award plaintiff.

$.....

[Question No. 5 is the last question for you, the jury, to consider. After completing those questions which the form indicates are appropriate in light of your findings, you should return this verdict form to the Court.]

.....

Foreman

.....

Date

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

BILL M. SILKWOOD, Administrator of the Esate of Karen G. Silkwood, Deceased, Plaintiff-Appellee,	)	
v.	)	
	)	No. 79-1894
THE KERR-McGEE CORPORATION, a Delaware corporation, and KERR-McGEE NUCLEAR CORPORATION, a Delaware corporation, Defendants-Appellants.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Bill M. Silkwood, Plaintiff-Appellee, hereby appeals to the Supreme Court of the United States from the final order denying rehearing in this action entered on February 19, 1982.

This appeal is taken pursuant to Title 28, United States Code, Section 1254(2).

Dated:

(s) *Arthur R. Angel*
301 First Life Assurance Bldg.
Oklahoma City, OK 73102

(s) *Jim Ikard*
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Attorneys for Plaintiff-Appellee

[Certificate of Service omitted in this printing]

ADDENDUM A

H.Rep. 296, 85th Cong, 1st Sess (1957):

"The basic principles underlying the bill are two:

1. Since the rights of third parties who are injured are established by State law, there is no interference with the State law until there is a likelihood that the damages exceed the amount of financial responsibility required together with the amount of the indemnity. At that point the Federal interference is limited to the prohibition of making payments through the State courts and to prorating the proceeds available.

2. A system of indemnification is established rather than an insurance system" . . . at p. 9.

S.Rep.No.1605, 89th Cong, 2nd Sess. *Reprinted in* 1966 U.S. Code, Cong. & Adm. News 3201 (1966) and H.Rep. No. 2043, 89th Cong, 2nd Sess (1966):

"Since its enactment by Congress in 1957, one of the cardinal attributes of the Price-Anderson Act has been its minimal interference with State law. Under the Price-Anderson system, the claimant's right to recover from the fund established by the Act is left to the tort law of the various states; the only interference with State law is a potential one, in that the limitation of liability feature of the Act would come into play in the exceedingly remote contingency of a nuclear incident giving rise to damages in excess of the amount of financial responsibility required together with the amount of the governmental indemnity." H.Rep. at p.6, S.Rep. at p.3201.

"Opponents of such a Federal [Nuclear tort] statute argue that it is unnecessary and inappropriate for the Federal Government to legislate in areas which the States are equipped to handle, particularly regarding

those matters which have been within their traditional jurisdiction. This seems especially so, they contend, when nothing has so far indicated that the substantive rules of existing American law will not provide adequate protection if a nuclear incident should occur." H.Rep. at p.7-8, S.Rep. at 3207.

"This [waiver of defenses] approach to the problems discussed above is in keeping with the approach followed in enacting the original Price-Anderson Act—namely, interfering with State law to the minimum extent necessary. In essence, the plan adopted permits retention of State law with respect to the cause of action and measure of damages, but the requirements specified for the insurance contracts and indemnity agreements provide the uniform rules needed to accomplish the bill's objectives. This approach, moreover, cements the new system firmly to the Price-Anderson Act without extending the new concepts to activities not covered by the Act. The objective of the committee in drafting this bill has been to perfect the Price-Anderson law, this is not a measure designed either to accomplish a general revision of American tort law or set precedents for activities in other fields." H.Rep. at p.9, S.Rep. at 3209.

"Furthermore, enactment of a Federal tort would require consideration of such matters as proof of damages and causation, and the possibility of continued validity of some portions of State law. This bill, on the other hand, seeks to isolate and deal effectively with certain problem areas in existing State and Federal law, leaving undisturbed the body of the law."

at p.10.

"at the same time, however, the bill has been drafted so that minor claims involving nuclear facilities or materials may remain subject to the traditional rules of tort law." H.Rep. at p.11, S.Rep. at 3211.

"Accordingly, in the absence of some extraordinary occurrence involving a nuclear facility or device or nuclear materials, traditional concepts should be allowed to prevail." H.Rep. at p.11, S.Rep. at 3211.

"Absent such a [ENO] determination, a claimant would have exactly the same rights that he has today under existing law—including, perhaps, benefit of a rule of strict liability if applicable State law so provides. Thus, this bill in no way provides for deprivation of a claimant's existing rights." H.Rep. at p.12, S.Rep. at 3212.

Congressional Record 23633 (Sept. 22, 1966):

Mr. Pasture.

"Moreover, it was important to note that S. 3830—while providing for the elimination of certain serious legal obstacles which might face claimants in the event of a substantial nuclear incident—does not establish a new body of Federal tort law. Instead, this bill follows the approach of the original Price-Anderson Act, that is, making a minimum interference with the laws of the several states insofar as legal liability for nuclear incidents is conceived. Our committee continues to endorse this general approach."

Congressional Record 24634 (Sept. 30, 1966):

Mr. Hosmer.

"The procedures under this bill for the settlement of claims on account of a nuclear accident come into play when the accident is of such type as the AEC determines to be an 'extraordinary nuclear occurrence'. Before that point there are still remedies, the usual ones, and the usual means of settling a claim. So whether or not there is an 'extraordinary nuclear occurrence' merely goes to the manner and procedures by which settlements are arrived at. It does not go to the substance of the rights of anyone."

Mr. Saylor.

"Does the gentleman from California mean to tell the House that if there is a nuclear incident there is another means of liability against the Federal Government, rather than as provided in the Price-Anderson bill?"

Mr. Hosmer.

"I am saying no such thing. I say merely that there might be a nuclear incident, and perhaps one person will be slightly injured and $20 worth of damage done to property. We would not call upon the procedures of this bill for settling that kind of situation. We would go about it in the ordinary manner of bringing a suit against somebody." at 24633.

Mr. Hosmer.

"This bill does not superimpose a new body of Federal law upon a segment of our traditional tort laws. Rather, it accomplishes the beneficial purposes we have in mind principally by providing for contractual agreement by the persons who might be held liable for a nuclear incident to forego certain defenses that might be available to them under applicable State or Federal law. The Atomic Energy Commission would also waive these defenses in its indemnity agreements. Through this mechanism the Price-Anderson Act will remain true to the principle that has been a cornerstone of the Act since its passage, viz. minimal interference with State law." at 24637.

H.Rep. 648, 94th Cong, 1st Sess (1975):

"The study by the Columbia University Legislative Drafting Research Fund examined the situation that would prevail if the Price-Anderson Act were to be allowed to expire. The study concluded that the resulting legal situation in the event of a [extraordinary] nuclear [occurrence] incident would be chaotic. In-

jured parties would be subject to whatever tort laws prevailed in the State in which the incident occurred or in which they suffered harm." at p.7.

ADDENDUM B

1. Silkwood did not intentionally remove plutonium from the plant. (Special Int. #1); she did not accidentally remove plutonium from the plant in her kits. (Kerr-MeGee stipulation)

2. Kerr-McGee was strongly anti-union: it broke a strike in 1973 using newly hired, untrained workers to perform extremely hazardous work in an effort to destroy the OCAW, tr. 3127, 3196-7, 7808, 7760, 6580, Px285, R.v. 13; Kerr-McGee instigated and strongly supported an attempt to decertify the OCAW as bargaining agent for the plant in the fall of 1974, tr. 7757-62, Px 182, R.v. 13; Kerr-McGee repeatedly blamed the union for its own deficiencies. tr. 7519-22, 7601-5.

3. Karen Silkwood was an active OCAW member and was the member of the three-person union negotiating team with responsibility for health and safety issues. tr. 7761-2.

4. In September, 1974, the three committee members traveled to Washington, D.C., met with OCAW national officials, and presented charges of numerous dangerous health and safety violations to AEC staff members. tr. 3123-5, 3148-53, Px63-A, R.v. 13. The AEC required documentation of the charges and Silkwood was assigned by OCAW officials the task of collecting documentations for the allegations. tr. 3136-7, 3217, 3239.

5. Silkwood also told the OCAW that there was evidence that x-rays of the fuel rods Kerr-McGee made at the plant were being falsified illegally, tr. 3123-25, 3312, and a plan was devised whereby the evidence of this would

be turned over to a reporter for the NEW YORK TIMES. tr. 3136. Silkwood was instructed by OCAW officials to maintain a low profile and do nothing which would call attention to her while she was gathering this information. tr. 3136-7, 3217, 3239.

6. Kerr-McGee management was aware of the trip to Washington and of the meeting with the AEC. tr. 1266, 3220, 8472, 6577-8, 8504-5, 3728.

7. To combat the decertification attempt OCAW brought in two plutonium experts to Oklahoma to present a seminar to plant employees. Silkwood actively participated in this attempt to demonstrate the deception being practiced by Kerr-McGee in concealing the risks of the jobs at the plant and engaged in a heated exchange with a fellow lab employee, Dwight Gary Longacre, a staunch union foe. Px130/1,/2,/3,/4, R.v. 13, tr. Vol. 15A and 16A.

8. On October 16, 1974, the union won the decertification election by a vote of 80-61. tr. 3219, 6269, 7761, 7487.

9. A few days after the union victory plutonium was added to a urine sample which had been turned in by Silkwood to the exclusive custody of the health physics office of Kerr-McGee. Dx156.

10. During this period of time Silkwood began collecting information and recording some of it in notebooks, Px120A, Px276, R.v. 13, tr. 3137, 3156, 3743, and relayed some of the information discovered to OCAW staffer Steve Wodka in a series of telephone conversations. Px131, R.v. 13, tr. 3138.

11. Kerr-McGee management discovered that Silkwood was collecting damaging information at the plant in mid-October, 1974. tr. 2291-2, 8510-11, 6954-5, 7678.

12. Subsequent to this discovery by Kerr-McGee and during the time Silkwood was assembling information both for the AEC investigation and the meeting with the NEW

YORK TIMES reporter, insoluble plutonium was again added to bicassay samples turned in by Silkwood to the exclusive custody and control of Kerr-McGee, Dx156, Dx37, R.v. 18.

13. In early November, 1974, arrangements were made to meet with David Burnham of the TIMES in Dallas, Texas. In response to repeated admonitions by Wodka that the charges of improprieties had to be documented, Silkwood assured Wodka that she had obtained such proof, tr. 3216-7; Wodka and his superior, Anthony Mazzochi, were confident that Silkwood was obtaining the necessary proof and that the union strategy of using these revelations in the press to strengthen the union position in upcoming contract negotiations was succeeding. tr. 3217, 3239, 3242-4.

14. Negotiations for a new collective bargaining contract were set for early November; Silkwood was a member of the union negotiating team. tr. 7761-2.

15. Silkwood left work on October 31 and did not return until November 5th. On her return to work she was given a written reprimand although she had not been contacted or interviewed prior to the time the reprimand was issued. Dx 37, Rv. 18, tr. 6368.

16. No source at the plant was located for either the November 5th or November 6th contaminations of Silkwood. See our Brief, p. 38 n.13. Silkwood's November 7th contamination was determined to be off-site. It was also discovered that 7 previously-collected sample kits had been spiked with insoluble plutonium which could not be naturally excreted. Dx 37, R.v. 18. The highest level of contamination in Silkwood's apartment was located on a package of food in the refrigerator. Dx37, R.v. 18.

17. All of the samples that were spiked were provided by Kerr-McGee and had been delivered into Kerr-McGee's exclusive custody and control. The one sample which had not yet been given to Kerr-McGee was located in Silkwood's locker and was not spiked. Dx37, R.v. 18.

18. The source of Silkwood's November 7th contamination was Pellet Lot 29—which had been shipped out of the plant in the prior summer. Silkwood did not have access to Lot 29, but Kerr-McGee management did since a sample of each lot was required to be kept in the vault. Px78-1, 78-2, R.v. 13.

19. Silkwood was immediately accused of having removed plutonium from the plant, tr. 3753-4, and arriving AEC inspectors were told by Kerr-McGee officials that Silkwood had taken plutonium. Kerr-McGee subsequently accused Silkwood of having intentionally contaminated herself—that she had deliberatly eaten plutonium in order to "embarass" the company. Px226, p. 3, tr. 8071-3.

20. The bioassay kits were immediately recognized as having been spiked with insoluble plutonium. Such an act by Silkwood would have placed her in the limelight in direct violation of instructions from OCAW headquarters and since her credibility was a paramount issue, tr. 3238, would have destroyed the union's bargaining position, its credibility, and hers. tr. 3238-40, 3330.

21. Silkwood knew that insoluble plutonium could not be naturally excreted, Add. 3, p. 4 to our Brief, and that plutonium could not be excreted at the levels contained in the kits. tr. 7707. Silkwood recognized the dangers of working with plutonium outside a controlled environment, tr. 7707, 3063, Add. 3, p.1 to our Brief. She was very health-conscious. tr. 9499.

22. The contamination of Silkwood's apartment would justify a search of her apartment to dig for the documents Kerr-McGee knew she was accumulating and would undermine her credibility with the AEC and the TIMES. tr. 3264-6, 3238-9. Silkwood's apartment was thoroughly searched and all of the contents were examined including some which, although not contaminated, were nevertheless seized. Dx37, R.v. 18.

23. As a result of her contamination Silkwood was denied further access to the plant, was placed in a punitive work assignment, and was accompanied by a guard whereever she went in the facility. tr. 7685-89, 7698-9, Px291, R.v. 13.

24. Silkwood was to meet with Wodka and Burnham in Oklahoma City on the night of November 13 to deliver the documentation she had assembled. tr. 3848-9, 3743. Early the evening of the 13th, Silkwood attended a OCAW strategy session where she displayed these documents to a fellow worker immediately before departing for the Wodka/Burnham meeting. tr. 3657, 3714-6.

25. Minutes after leaving the union strategy session Silkwood was killed in an automobile accident. That night Kerr-McGee officials searched the wrecked automobile. The documents which Silkwood had immediately before the accident were never found. See our offer of proof tr. 9935-41.

26. After Silkwood's death the other negotiating team members were harrassed and punished as were other union members, tr. 2229, 2302-6, 265401272-3, including the mandatory administration of a polygraph examination which focused on union matters.

27. After Silkwood's death the AEC confirmed many of the safety and health problems identified in the September 27th meeting in Washington, Dx38, R.v. 18, and a special ERDA review team confirmed that photomicrographs of test welds on the fuel rods had been touched up to obscure defects in the negatives in or near the critical weld areas. Dx99, R.v. 18, tr. 7557-61, 7658. In December, 1975, the plant was closed.

ARTICLE VI, Clause 2 of the United States Constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

FIFTH AMENDMENT to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

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28 U.S.C. § 1254. *Courts of appeals; certiorari; appeal; certified questions.*

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance such appellant, and the review on appeal shall be restricted to the Federal question presented.

[APPENDIX]

28 U.S.C. § 1257. *State courts; appeal; certiorari*

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

28 U.S.C. § 2103. *Appeal from State court or from a United States court of appeals improvidently taken regarded as petition for writ of certiorari*

If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs.

42 U.S.C. § 2011. *Congressional declaration of policy*

Atomic energy is capable of application for peaceful as well as military purposes. It is therefore declared to be the policy of the United States that—

(a) the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, subject at all times to

the paramount objective of making the maximum contribution to the common defense and security; and

(b) the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise.

42 U.S.C. § 2012. *Congressional findings*

The Congress of the United States makes the following findings concerning the development, use, and control of atomic energy:

(a) The development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security.

(b) Repealed. Pub.L. 88-489, § 1, Aug. 26, 1964, 78 Stat. 602.

(c) The processing and utilization of source, byproduct, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest.

(d) The processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public.

(e) Source and special nuclear material, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public.

(f) The necessity for protection against possible interstate damage occurring from the operation of facilities for

the production or utilization of source or special nuclear material places the operation of those facilities in interstate commerce for the purposes of this chapter.

(g) Funds of the United States may be provided for the development and use of atomic energy under conditions which will provide for the common defense and security and promote the general welfare.

* * * *

(i) In order to protect the public and to encourage the development of the atomic energy industry, in the interest of the general welfare and of the common defense and security, the United States may make funds available for a portion of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses.

42 U.S.C. § 2013. *Purpose of chapter*

It is the purpose of this chapter to effectuate the policies set forth above by providing for—

(a) a program of conducting, assisting, and fostering research and development in order to encourage maximum scientific and industrial progress.

* * * *

(c) a program for Government control of the possession, use, and production of atomic energy and special nuclear material, whether owned by the Government or others, so directed as to make the maximum contribution to the common defense and security and the national welfare, and to provide continued assurance of the Government's ability to enter into and enforce agreements with nations or groups of nations for the control of special nuclear materials and atomic weapons;

(d) a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with

the common defense and security and with the health and safety of the public;

• • • •

(f) a program of administration which will be consistent with the foregoing policies and programs, with international arrangements, and with agreements for cooperation, which will enable the Congress to be currently informed so as to take further legislative action as may be appropriate.

42 U.S.C. § 2014. *Definitions*

The intent of Congress in the definitions as given in this section should be construed from the words or phrases used in the definitions. As used in this chapter:

• • • •

(c) The term "atomic energy" means all forms of energy released in the course of nuclear fission or nuclear transformation.

• • • •

(e) The term "byproduct material" means (1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.

• • • •

(j) The term "extraordinary nuclear occurrence" means any event causing a discharge or dispersal of source, special nuclear, or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the Commission determines to be substantial, and which the Commission determines has resulted or will probably result in substantial damages to persons offsite or property offsite. Any determination by the Commission that such an event has, or has not, occurred shall be final

and conclusive, and no other official or any court shall have power or jurisdiction to review any such determination. The Commission shall establish criteria in writing setting forth the basis upon which such determination shall be made. As used in this subsection, "offsite" means away from "the location" or "the contract location" as defined in the applicable Commission indemnity agreement, entered into pursuant to section 2210 of this title.

(k) The term "financial protection" means the ability to respond in damages for public liability and to meet the costs of investigating and defending claims and settling suits for such damages.

* * * *

(p) The term "licensed activity" means an activity licensed pursuant to this chapter and covered by the provisions of section 2210(a) of this title.

(q) The term "nuclear incident" means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material: *Provided, however,* That as the term is used in section 2210(*l*) of this title, it shall include any such occurrence outside the United States: *And provided further,* That as the term is used in section 2210(d) of this title, it shall include any such occurrence outside the United States if such occurrence involves source, special nuclear, or byproduct material owned by, and used by or under contract with, the United States: *And provided further,* That as the term is used in section 2210(c) of this title, it shall include any such occurrence outside both the United States and any other nation if such occurrence arises out of or results from the radioactive, toxic, explosive, or other hazardous properties of source, special nu-

clear, or byproduct material licensed pursuant to subchapters V, VI, VII, and IX of this chapter, which is used in connection with the operation of a licensed stationary production or utilization facility or which moves outside the territorial limits of the United States in transit from one person licensed by the Commission to another person licensed by the Commission.

* * * *

(t) The term "person indemnified" means (1) with respect to a nuclear incident occurring within the United States or outside the United States as the term is used in section 2210(c) of this title, and with respect to any nuclear incident in connection with the design, development, construction, operation, repair, maintenance, or use of the nuclear ship Savannah, the person with whom an indemnity agreement is executed or who is required to maintain financial protection, and any other person who may be liable for public liability or (2) with respect to any other nuclear incident occurring outside the United States, the person with whom an indemnity agreement is executed and any other person who may be liable for public liability by reason of his activities under any contract with the Commission or any project to which indemnification under the provisions of section 2210(d) of this title has been extended or under any subcontract, purchase order, or other agreement, of any tier, under any such contract or project.

* * * *

(w) The term "public liability" means any legal liability arising out of or resulting from a nuclear incident, except: (i) claims under State or Federal workmen's compensation acts of employees of persons indemnified who are employed at the site of and in connection with the activity where the nuclear incident occurs; (ii) claims arising out of an act of war; and (iii) whenever used in section 2210(a), (c), and (k) of this title, claims for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the licensed activity

where the nuclear incident occurs. "Public liability" also includes damage to property of persons indemnified: *Provided*, That such property is covered under the terms of the financial protection required, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs.

* * * *

42 U.S.C. § 2021

State regulation of activities for certain purposes

(k) Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

42 U.S.C. § 2210. *Indemnification and limitation of liability —Financial protection for public liability claims; indemnification agreement; waiver of immunity*

(a) Each license issued under section 2133 or 2134 of this title and each construction permit issued under section 2235 of this title shall, and each license issued under section 2073, 2093, or 2111 of this title may, for the public purposes cited in section 2012(i) of this title, have as a condition of the license a requirement that the licensee have and maintain financial protection of such type and in such amounts as the Commission in the exercise of its licensing and regulatory authority and responsibility shall require in accordance with subsection (b) of this section to cover public liability claims. Whenever such financial protection is required, it may be a further condition of the license that the licensee execute and maintain an indemnification agreement in accordance with subsection (c) of this section. The Commission may require, as a further condition of issuing a license, that an applicant waive any immunity from public liability conferred by Federal or State law.

* * * *

Indemnification from public liability in excess of level of financial protection; aggregate indemnity

(c) The Commission shall, with respect to licenses issued between August 30, 1954, and August 1, 1987, for which it requires financial protection of less than $560,000,000, agree to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability arising from nuclear incidents which is in excess of the level of financial protection required of the licensee. The aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed $500,000,000 excluding costs of investigating and settling claims and defending suits for damage: *Provided, however,* That this amount of indemnity shall be reduced by the amount that the financial protection required shall exceed $60,000,000. Such a contract of indemnification shall cover public liability arising out of or in connection with the licensed activity. With respect to any production or utilization facility for which a construction permit is issued between August 30, 1954, and August 1, 1987, the requirements of this subsection shall apply to any license issued for such facility subsequent to August 1, 1987.

Indemnification agreements for construction or operation of production or utilization facilities, or other activities, applicability to contracts; sovereign immunity

(d) In addition to any authority the Commission may have, the Commission is authorized until August 1, 1987, to enter into agreements of indemnification with its contractors for the construction or operation of production or utilization facilities or other activities under contracts for the benefit of the United States involving activities under the risk of public liability for a substantial nuclear incident. In such agreements of indemnification the Commission may require its contractor to provide and maintain financial protection of such a type and in such amounts as the Commission shall determine to be appropriate to cover public liability arising out of or in connection with the contract-

ual activity, and shall indemnify the persons indemnified against such claims above the amount of the financial protection required, in the amount of $500,000,000, excluding costs of investigating and settling claims and defending suits for damage in the aggregate for all persons indemnified in connection with such contract and for each nuclear incident: *Provided,* That this amount of indemnity shall be reduced by the amount that the financial protection required shall exceed $60,000.00: *Provided further,* That in the case of nuclear incidents occurring outside the United States, the amount of the indemnity provided by the Commission shall not exceed $100,000,000. The provisions of this subsection may be applicable to lump sum as well as cost type contracts and to contracts and projects financed in whole or in part by the Commission. A contractor with whom an agreement of indemnification has been executed and who is engaged in activities connected with the underground detonation of a nuclear explosive device shall be liable, to the extent so indemnified under this section, for injuries or damage sustained as a result of such detonation in the same manner and to the same extent as would a private person acting as principal, and no immunity or defense founded in the Federal, State, or municipal character of the contractor or of the work to be performed under the contract shall be effective to bar such liability.

Aggregate liability for a single nuclear incident

(e) The aggregate liability for a single nuclear incident of persons indemnified, including the reasonable costs of investigating and settling claims and defending suits for damage, shall not exceed (1) the sum of $500,000,000 together with the amount of financial protection required of the licensee or contractor or (2) if the amount of financial protection required of the licensee exceeds $60,000,000, such aggregate liability shall not exceed the sum of $560,000,000 or the amount of financial protection required of the licensee, whichever amount is greater: *Provided,* That in the event of a nuclear incident involving damages in excess

of that amount of aggregate liability, the Congress will thoroughly review the particular incident and will take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude: *And provided further*, That with respect to any nuclear incident occurring outside of the United States to which an agreement of indemnification entered into under the provisions of subsection (d) of this section is applicable, such aggregate liability shall not exceed the amount of $100,000,000 together with the amount of financial protection required of the contractor.

* * * *

Survey of causes and extent of damage; report to Joint Committee, Congressmen of affected districts and Senators of affected States; availability to public

(i) After any nuclear incident which will probably require payments by the United States under this section or which will probably result in public liability claims in excess of $560,000,000, the Commission shall make a survey of the causes and extent of damage which shall forthwith be reported to the Joint Committee, to the Congressmen of the affected districts, and to the Senators of the affected States, and, except for information which would cause serious damage to the national defense of the United States, all final findings shall be made available to the public, to the parties involved and to the courts. The Commission shall report to the Joint Committee by April 1, 1958, and every year thereafter on the operations under this section.

* * * *

Agreements for establishment of procedures for handling, investigation, and settlement of public liability claims; emergency assistance payments

(m) The Commission is authorized to enter into agreements with other indemnitors to establish coordinated procedures for the prompt handling, investigation, and settlement of claims for public liability. The Commission and

other indemnitors may make payments to, or for the aid of, claimants for the purpose of providing immediate assistance following a nuclear incident. Any funds appropriated to the Commission shall be available for such payments. Such payments may be made without securing releases, shall not constitute an admission of the liability of any person indemnified or of any indemnitor, and shall operate as a satisfaction to the extent thereof of any final settlement or judgment.

Waiver of defenses; jurisdiction and venue of public liability actions; removal or transfer of actions; process

(n)(1) With respect to any extraordinary nuclear occurrence to which an insurance policy or contract furnished as proof of financial protection or an indemnity agreement applies and which—

(a) arises out of or results from or occurs in the course of the construction, possession, or operation of a production or utilization facility, or

(b) arises out of or results from or occurs in the course of transportation of source material, byproduct material, or special nuclear material to or from a production or utilization facility, or

(c) during the course of the contract activity arises out of or results from the possession, operation, or use by a Commission contractor or subcontractor of a device utilizing special nuclear material or byproduct material,

the Commission may incorporate provisions in indemnity agreements with licensees and contractors under this section, and may require provisions to be incorporated in insurance policies or contracts furnished as proof of financial protection, which waive (i) any issue or defense as to conduct of the claimant or fault of persons indemnified, (ii) any issue or defense as to charitable or governmental immunity, and (iii) any issue or defense based on any statute of limitations if suit is instituted within three years from

the date on which the claimant first knew, or reasonably could have known, of his injury or damage and the cause thereof, but in no event more than twenty years after the date of the nuclear incident. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. When so incorporated, such waivers shall be judicially enforcible in accordance with their terms by the claimant against the person indemnified. Such waivers shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages, nor shall such waivers apply to injury or damage to a claimant or to a claimant's property which is intentionally sustained by the claimant or which results from a nuclear incident intentionally and wrongfully caused by the claimant. The waivers authorized in this subsection shall, as to indemnitors, be effective only with respect to those obligations set forth in the insurance policies or the contracts furnished as proof of financial protection and in the indemnity agreements. Such waivers shall not apply to, or prejudice the prosecution or defense of, any claim or portion of claim which is not within the protection afforded under (i) the terms of insurance policies or contracts furnished as proof of financial protection, or indemnity agreements, and (ii) the limit of liability provisions of subsection (e) of this section.

(2) With respect to any public liability action arising out of or resulting from an extraordinary nuclear occurrence, the United States district court in the district where the extraordinary nuclear occurrence takes place, or in the case of an extraordinary nuclear occurrence taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission, any such action pending in any State court or United States district court shall be removed

or transferred to the United States district court having venue under this subsection. Process of such district court shall be effective throughout the United States.

Percentage limitation; distribution plans; claim disposition and fund distribution plans; allocation for personal injury, property damage, and possible latent injury claims; approval, disapproval, or modification; adoption of other plan; orders for implementation and enforcement of provisions; area orders effective; report to Joint Committee by Commission; contents

(o) Whenever the United States district court in the district where a nuclear incident occurs, or the United States District Court for the District of Columbia in case of a nuclear incident occurring outside the United States, determines upon the petition of any indemnitor or other interested person that public liability from a single nuclear incident may exceed the limit of liability under subsection (e) of this section:

(1) Total payments made by or for all indemnitors as a result of such nuclear incident shall not exceed 15 per centum of such limit of liability without the prior approval of such court;

(2) The court shall not authorize payments in excess of 15 per centum of such limit of liability unless the court determines that such payments are or will be in accordance with a plan of distribution which has been approved by the court or such payments are not likely to prejudice the subsequent adoption and implementation by the court of a plan of distribution pursuant to subparagraph (3) of this subsection (o); and

(3) The Commission shall, and any other indemnitor or other interested person may, submit to such district court a plan for the disposition of pending claims and for the distribution of remaining funds available. Such a plan shall include an allocation of appropriate amounts for personal injury claims, property damage claims, and possible latent injury claims which may not be discovered until a

later time and shall include establishment of priorities between claimants and classes of claims, as necessary to insure the most equitable allocation of available funds. Such court shall have all power necessary to approve, disapprove, or modify plans proposed, or to adopt another plan; and to determine the proportionate share of funds available for each claimant. The Commission, any other indemnitor, and any person indemnified shall be entitled to such orders as may be appropriate to implement and enforce the provisions of this section, including orders limiting the liability of the persons indemnified, orders approving or modifying the plan, orders staying the payment of claims and the execution of court judgments, orders apportioning the payments to be made to claimants, and orders permitting partial payments to be made before final determination of the total claims. The orders of such court shall be effective throughout the United States.

(4) The Commission shall, within ninety days after a court shall have made such determination, deliver to the Joint Committee a supplement to the report prepared in accordance with subsection (i) of this section setting forth the estimated requirements for full compensation and relief of all claimants, and recommendations as to the relief to be provided.

---

23 O.S. § 9. *Jury may give exemplary damages, when*

In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant.

No. 81-2159

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BILL M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, Deceased,

Appellant,

vs.

KERR-McGEE CORPORATION, a Delaware corporation, and KERR-McGEE NUCLEAR CORPORATION, a Delaware corporation,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

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No. 81-2159

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OCTOBER TERM, 1981

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Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

The appellees, Kerr-McGee Corporation and Kerr-McGee Nuclear Corporation, respectfully move to dismiss this appeal or affirm the judgment below of the United States Court of Appeals for the Tenth Circuit.

STATEMENT OF THE CASE

The appellant's misleading statement of the case necessitates an additional explanation by the appellees of the decision below by the Tenth Circuit and the underlying facts.

The Tenth Circuit Opinion

The Tenth Circuit held that the district court should have granted the appellees judgment notwithstanding the verdict on the personal injury claim, since the evidence supported only the conclusion that Karen Silkwood's exposure to plutonium in November, 1974, occurred either at the job site or in preparation of a urine sample at the direction of her employer. Because all exposures were job-related, the Tenth Circuit correctly held that exclusive jurisdiction over the claim for personal injuries was vested in Oklahoma's Workers' Compensation Court.[1]

After reversing the underlying compensatory award for personal injuries, the Tenth Circuit reversed the punitive damage verdict because exclusive regulatory authority over radiation hazards is granted to the Atomic Energy Commission ["AEC"] by the Atomic Energy Act of 1954. The court below reasoned that since punitive damages were designed to punish reprehensible conduct and to deter others from similar conduct in the future, they had a regulatory effect. The Tenth Circuit held that a judicial award of exemplary damages under state law to punish or deter alleged unsatisfactory practices involving exposure to radiation was no less intrusive than direct legislative regulation of radiation hazards by a state and was, therefore, preempted by federal law.

The court affirmed an award in the stipulated amount of $5,000 for property removed from Silkwood's apartment during the decontamination process.

---

[1] The appellant does not challenge here the correctness of the Tenth Circuit's holding disposing of Silkwood's personal injury claim on state law grounds. Moreover, that decision is not subject to review here. *See, e.g., City of Mesquite* v. *Aladdin's Castle, Inc.*, 102 S. Ct. 1070 (1982); *McCluney* v. *Jos. Schlitz Brewing Co.*, 102 S. Ct. 624 (1982) (Stevens, J. dissenting from summary affirmance); *Baxter* v. *Continental Casualty Co.*, 284 U. S. 578 (1931).

Statement of Facts

The appellant has set forth a slanted statement of facts, which is largely irrelevant to the current posture of the case. Within the constraints of brevity, the appellees shall correct a few of the more flagrant aspects of the appellant's statement (from which all record references are omitted).[2]

Karen Silkwood was a laboratory analyst employed by Kerr-McGee Nuclear Corporation at its Cimarron plutonium fuel fabrication facility. She was exposed to plutonium[3] on November 5, 6, and 7, 1974.[4]

By selectively citing and inaccurately paraphrasing the testimony of James Keppler, the regional director of the AEC, the appellant attempts to create the misimpression of unsafe operations, asserting that the appellees were cited for over seventy-five violations of AEC regulations and that AEC inspectors expressed harsh criticism of the Cimarron facility's

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[2] Citations herein are to the: report of proceedings in the district court ["R. ____"]; the appellant's jurisdictional statement ["J. S. ____"]; the appendix to the jurisdictional statement ["J. S. App. ____"]; and the appendix to this motion ["A. ____"].

[3] Plutonium is an artificially-produced, radioactive chemical element (R. 726) which has been instrumental in the development of nuclear power. The use and possession of plutonium, like other radioactive material, is carefully and comprehensively regulated by the federal government.

[4] An autopsy showed that the amount of plutonium in Silkwood's body at the time of her death, a week after the exposures, was 8.8 nanocuries. R. 7078; Defendant's Exhibit 37, A. 55. (Silkwood was killed in an automobile crash unrelated to this appeal.) Under standards established by the International Commission on Radiological Protection (ICRP) and the National Council on Radiation Protection (NCRP) and followed by the AEC, the permissible body burden for occupational workers is 40 nanocuries. At this level no adverse health effects are expected. *E.g.*, R. 7080, 9177-78.

operation. In fact, Mr. Keppler testified that the AEC viewed the plutonium plant as a "safe operation." R. 8158. Moreover, Kerr-McGee's operation of the plutonium plant never resulted in a fine by the AEC, or even a recommendation that such a fine be levied. R. 8157. Mr. Keppler further testified that there were no serious personnel exposures at the plutonium plant (R. 8255-6); that Kerr-McGee did not exceed the regulatory requirements with respect to exposure levels which would result in significant health hazards (R. 8256); and that under regulations and reporting requirements in effect at the time of trial, there would not have been even *one* exposure incident in 1973 or 1974 serious enough to warrant reporting it to the AEC. R. 8257.

The appellant's charge of malice toward Karen Silkwood is also totally unsupported. Indeed, it is fundamental to an understanding of the record below to recognize that the plaintiff totally failed to offer proof on the mechanism of Silkwood's exposure or the contamination of her apartment and that the plaintiff's counsel expressly conceded his inability to do so. *E.g.*, R. 3443. Having failed to prove how the exposures occurred, it is axiomatic that they were not proven to be the product of malice.

Instead of establishing evil intent, the record discloses that Kerr-McGee acted with great care and concern for Silkwood's safety and medical condition. *E.g.*, R. 7034-7036, 7043. In short, the undisputed facts are that when Silkwood was available, she received care and attention from Kerr-McGee; any delay was attributable solely to her own actions. *E.g.*, R. 7036, 7064.

Nor was there any evidence of malice or evil intent towards employees in general. The design of the plant and the equipment and processes utilized therein were "state of the art" and were approved by the AEC. R. 5497. Allegations of inadequate training and production at the expense of workers'

safety were thoroughly investigated by the AEC and found to be unsubstantiated. The AEC specifically concluded that the training curriculum emphasized health and safety procedures, pointed out the hazards associated with plutonium, and included adequate instruction on the biological effects of exposure. Defendants' Exhibit 38. The claim that Kerr-McGee concealed the hazards of plutonium from its workers through the omission of the word "cancer" and the use of arcane jargon incomprehensible to the workers is likewise baseless. The first sentence of the section of its health physics training manual dealing with the health effects of plutonium states, "... it is presently felt the major hazard from plutonium in man is malignancy." Defendants' Exhibit 5.

The appellant's discussion of the plant's physical security system in the context of this exposure is similarly misleading. Obviously, the security system was intended to prevent diversion of strategic quantities of plutonium, *i.e.* amounts which through repeated intentional removal, over time, could provide enough material to fashion a weapon. R. 7982. The physical security system was neither designed nor intended (nor required by the AEC) to prevent the removal of the minute quantity (less than .0003 grams) of plutonium involved in this case. R. 7980-1. The principal safeguard for prevention of the removal of minute quantities of plutonium was, in fact, self-monitoring by those who had authorized access to the restricted areas where plutonium was handled. R. 4531. Silkwood and other employees were required to monitor themselves at least five separate times between their work stations and the door to the plant. R. 4529-30, Defendants' Exhibit 144. Kerr-McGee's physical security system was in complete compliance with the AEC regulations at the time of Silkwood's exposure. Defendants' Exhibit 37, A. 14.

Inexplicably, the appellant asserts that he established at trial that the appellees violated the AEC regulations governing

radiation exposures with respect to Karen Silkwood. J. S. 11. Not only is this untrue, it is flatly contradicted both by the appellant's counsel's own admission at trial that he didn't know how Silkwood was contaminated (*E.g.*, R. 553) and his concession in the petition for rehearing below that:

> "... [N]o express license condition was violated by KM." Petition for Rehearing, p. 14, n. 20.

As the appellant well knows, Kerr-McGee's license was "subject to all applicable rules, regulations, and orders of the Atomic Energy Commission." Defendants' Exhibit 2.

The AEC made an exhaustive investigation into Silkwood's exposures to plutonium. Defendants' Exhibit 37, A. 1, *et seq.* The AEC's final report of this investigation contains a detailed chronology of the events relating to Silkwood's contamination and decontamination, analyses of bioassay data, and specific factual conclusions. The AEC concluded that Silkwood received less than one-half of the maximum permissible body burden of plutonium from the exposure incidents and further concluded that Kerr-McGee's only violation of regulations was the failure to maintain a record of the voiding dates on two bioassay samples submitted by Silkwood. Defendants' Exhibit 37, A. 17. This violation, which occurred because Silkwood failed to supply Kerr-McGee with the voiding dates, was not causally related to her exposure or alleged injury in any way. There is, in fact, no basis for the claim that Kerr-McGee was not in complete compliance with federal regulations as they pertained to Silkwood.

MOTION TO DISMISS

Appellate Jurisdiction Does Not Lie for This Appeal Under § 1254(2).

This appeal should be dismissed for the reason that the Court of Appeals below did not hold a state statute to be invalid as repugnant to the Constitution, treaties or laws of the United States. 28 U. S. C. § 1254(2).

The state statute asserted to provide the basis for jurisdiction here is the Oklahoma punitive damages statute, 23 O. S. § 9, which permits a jury to award exemplary damages where a defendant has been guilty of oppression, fraud or malice. After reversing the compensatory award for personal injuries, the Tenth Circuit held that under the Atomic Energy Act any state action that competes substantially with the Nuclear Regulatory Commission in its regulation of radiation hazards is preempted. The court then held that "punitive damages may not be awarded in this case." J. S. App. 24a. However, the court below never addressed, analyzed or ruled on the validity of the punitive damages statute itself. In fact, nowhere in the Tenth Circuit's opinion is the statute even mentioned.[5] It is respectfully urged that this is *not* tantamount to a holding that the Oklahoma punitive damages statute is invalid.

In failing to demonstrate any consideration of the Oklahoma statute by the Tenth Circuit, the appellant has failed to establish any basis for an appeal under the narrowly-interpreted § 1254(2). In comparable situations where jurisdic-

[5] The transparency of the appellant's attempt to bootstrap appellate jurisdiction here is demonstrated by his argument that the decision below violated "standards respecting preemption of common law rights" (J. S. 17); *see also* Judge Doyle's dissent (J. S. App. 32a) (stating that the issue in this case is whether the Atomic Energy Act impliedly preempts part of Oklahoma's *common law* remedy).

tion was claimed under § 1257(2), appeals have been dismissed. *See, May* v. *Anderson*, 345 U. S. 528, 530 (1953) (appeal would not lie where the state statute alleged to be the basis for appeal was not considered by the court below); *Kulko* v. *Superior Court of California*, 436 U. S. 84, 90 (1978) (appeal dismissed because opinion below did not purport to determine the constitutionality of a California statute).

Even where consideration of a state statute is clear, such decisions limiting the applicability of statutes under the Supremacy Clause do not in all instances constitute a finding that such statutes are invalid. In *Minnesota* v. *Hoffman*, 543 F. 2d 1198 (8th Cir. 1976), *appeal dismissed for want of jurisdiction, sub nom., Minnesota* v. *Alexander*, 430 U. S. 977 (1977), the Eighth Circuit held that the State of Minnesota was prohibited by reason of the Supremacy Clause from applying state water pollution regulations to the Army Corps of Engineers. The appeal to this Court under § 1254(2) was dismissed.

The cases relied upon by the appellant (J. S. 2-3) are readily distinguishable. In each, a specifically identified statute is expressly held to be invalid, either facially or as applied, by the court of appeals. In each, the challenged statute is fully analyzed and is the focus of the court's holding. Here the Oklahoma statute is never identified as being the subject of the holding, nor is any consideration by the court below of the statute's validity or applicability to these unique facts articulated or even disclosed. This is particularly germane where, as here, the compensatory award for alleged personal injuries upon which the punitive damage claim was premised, has itself been reversed on state grounds.

MOTION TO AFFIRM

A. This Court Should Affirm the Tenth Circuit's Ruling That an Award of Punitive Damages Is Preempted in This Case.

The Jurisdictional Statement distorts the holding and impact of the decision below respecting punitive damages and seeks an unwarranted disruption in the orderly, and heretofore consistent, growth of the law surrounding federal regulation of radiation hazards.[6] The Tenth Circuit simply held that the imposition of punitive damages in this case constitutes state regulation of radiological hazards which conflicts with the regulatory scheme of the Atomic Energy Act and is therefore preempted. In so holding, the Tenth Circuit was forging no new legal principles, but merely following sound, established legal precedent of this Court and the lower federal courts.

The Tenth Circuit Correctly Held That the Imposition of Punitive Damages Is Preempted by the Atomic Energy Act.

The Atomic Energy Act of 1946 codified Congressional concern over the control of radioactive materials by providing the AEC with a monopoly on the ownership, production and use of all fissionable material. Ch. 724, 60 Stat. 755. Recognizing the great potential for peaceful use of atomic power,

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[6] The *Pacific Gas and Electric* case, now before this Court on writ of certiorari, does not present an issue which would affect the outcome of this case. *Pacific Legal Foundation* v. *State Energy Resources Conservation and Development Comm.*, 659 F. 2d 903 (9th Cir. 1981), *cert. granted sub nom., Pacific Gas & Electric* v. *State Energy Resources Conservation and Development Comm.*, 50 U. S. L. W. 3994 (June 21, 1982). There, a state statute was upheld by the Ninth Circuit against a Supremacy Clause challenge on the basis that it was enacted "for purposes other than protection against radiation hazards." 659 F. 2d at 923. Neither the Ninth Circuit's decision nor the argument of either party challenges the principle of federal supremacy in the regulation of radiation hazards. The issue on certiorari is whether the particular California laws there in question invade that exclusive federal province. Thus, the case does not call into question the consistent series of decisions holding that federal law has preempted the regulation of radiation hazards.

Congress, by the Atomic Energy Act of 1954, 42 U. S. C. § 2011, *et seq.*, allowed private participation in the development of nuclear energy but only under a comprehensive statutory program of federal licensing and regulation described as "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency." *Siegel* v. *AEC*, 400 F. 2d 778, 783 (D. C. Cir. 1968). The expressed dual purpose of the Act was to foster the peacetime use of atomic energy and to protect the public from undue radioactive hazards. 42 U. S. C. §§ 2011-13.

The 1954 Act provided the AEC with extensive regulatory and rule-making authority, and charged the AEC with the duty to formulate regulations to protect public health and safety. 42 U. S. C. § 2201(b). In 1959 Congress amended the Act by adding Section 274 to clarify the responsibilities of the states and the AEC with respect to control of by-product, source and special nuclear material. 42 U. S. C. § 2021. This section establishes procedures and criteria for the discontinuance by the AEC (and "assumption" by the states) of certain specified responsibilities, otherwise within exclusive AEC domain. But such an assumption can only take place if a state enters into a "Section 274 Agreement" with the AEC (NRC).[7] Oklahoma has never entered into such an agreement and the Commission has surrendered none of its authority to regulate nuclear materials.

The exclusivity of the NRC's jurisdiction as well as the need and purpose for such exclusivity was clearly enunciated in

[7] In favorably reporting the section 274 legislation, the Joint Committee on Atomic Energy declared that "the Commission has exclusive authority to regulate for protection against radiation hazards until such time as the State enters into an agreement with the Commission to assume such responsibility." S. Rep. No. 820, 86th Cong., 1st Sess., 12, *reprinted in* 1959 U. S. Code Cong. & Admin. News 2872, 2883. *See also, Hearings before the Joint Committee on Atomic Energy on Federal-State Relationships in the Atomic Energy Field*, 86th Cong., 1st Sess., 287-316 (1959).

Northern States Power Co. v. *Minnesota*, 447 F. 2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U. S. 1035 (1972):

> The nature of the subject matter regulated and the need for uniform controls in order to effectuate the objectives of Congress are additionally supportive of a finding of pre-emption. In enacting the Atomic Energy Act of 1954, Congress made specific findings concerning the development, use and control of atomic energy. Included in these findings are a number of statements to the effect that the processing and utilization of source, by-product and special nuclear material *must be regulated by the United States in the national interest* because of their effect upon interstate and foreign commerce and in order to provide for the common defense and security and to protect the health and safety of the public. (Emphasis in original).

Id. at 1153.[8]

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[8] In *Northern States* the preemption arose out of the Atomic Energy Act of 1954, as amended. As far as state regulation is concerned, the sole savings clause in the Act permits states to regulate activities "for purposes *other than protection against radiation hazards*," § 2021(k) (emphasis added). *See Hearings Before the Joint Committee on Atomic Energy on Federal-State Relationships in the Atomic Energy Field*, 86th Cong., 1st Sess. 492-93 (1959) during which the following exchange occurred:

> Mr. Ramey: Is it not the Commission position, that without the lead-off language of subsection [274]k, [that state regulation was to be permitted only pursuant to the agreements authorized by Section 274(b)], the same result is legally intended and legally effective?
>
> Mr. Lowenstein: Yes.
>
> • • •
>
> Chairman Anderson: You have preempted the field, have you not?
>
> Mr. Lowenstein: Yes, sir.

Here Silkwood does not even contend that the purpose of the punitive damages award was to punish or deter activities other than those involving radiation hazards.

The holding of *Northern States* was subsequently reaffirmed by this Court in *Train* v. *Colorado Public Interest Research Group*, 426 U. S. 1, 16 (1976), where the Court recognized the "absence of any room for a state role" in the regulation of radiological hazards. Moreover, contrary to any assertions made in the Jurisdictional Statement, recent circuit court case law demonstrates the continued vitality of *Northern States*. *See Illinois* v. *Kerr-McGee Chemical Corp.*, 677 F. 2d 571, 581 (7th Cir. 1982) ("[T]he Atomic Energy Act has expressly and impliedly preempted regulation by the states of the radiation hazards associated with nuclear materials."); *Pacific Legal Foundation* v. *State Energy Resources Conservation and Development Comm.*, 659 F. 2d 903, 921 (9th Cir. 1981), *cert. granted sub nom., Pacific Gas & Electric* v. *State Energy Resources Conservation and Development Comm.*, 50 U. S. L. W. 3994 (June 21, 1982) ("[The legislative history of section 274] demonstrate(s) Congress's intent to assert exclusive federal control over the radiation hazards associated with nuclear materials.").[9]

Silkwood attempts to avoid the impact of *Northern States* by noting that this case involves no state "regulations" or state agency. J. S. 15. Certainly this is a distinction without a difference and stems from a fundamental misunderstanding of the nature and function of punitive damages. Unlike compensatory damages, punitive damages "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence". *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323,

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[9] Appellant argues that *Northern States* is no longer viable (J. S. 16-17), because the Clean Air Act Amendments of 1977 expressly permit state regulation of radiation emissions under certain specific and limited circumstances. Such specific delegation of limited authority to the states by federal statute is entirely consistent with underlying and continuing federal control of all nuclear radiation hazards not covered by such specific delegation. In short, the doctrine of *Northern States* is alive in all areas of control of nuclear radiation hazards, except those specifically delegated to the states by federal statute.

350 (1974). The primary purpose for imposition of punitive damages has been the regulation of conduct through punishment and deterrence. Restatement (Second) of Torts § 908(1), Comment a (1979); Comment, *Implied Preemption of Punitive Damages for Nuclear Accidents*, 29 American U. L. Rev. 741, 756 (1980). In fact, under Oklahoma law, if a punitive award will neither punish nor have a deterrent effect, the award will be disallowed. *Nixon* v. *Oklahoma City*, 555 P. 2d 1283, 1285 (Okla. 1976). The punishment-deterrent rationale was explicitly recognized by the trial judge in his instructions to the jury. J. S. App. 112a.

In imposing punitive damages, the jury and the district court were prescribing the manner in which Kerr-McGee must conduct operations in its plant. The regulatory intent and impact of a punitive damages award is at least as forceful and intrusive as a law issued by a state legislature or a regulation promulgated by a state administrative agency. Indeed, the *ad hoc* imposition of punitive damages is more pernicious than a statute or formal regulation, because the arbitrary and uncontrollable features of the award, recognized in *International Brotherhood of Electrical Workers* v. *Foust*, 442 U. S. 42, 50-51 n.14 (1979), prevent a uniform system of regulation and are not balanced with the stated Congressional purpose of promoting nuclear energy.

In fact, the particular circumstances of this case illustrate why the imposition of punitive damages *is* a form of regulation. Here, not only is there no evidence of deliberate or even reckless violation of a regulation causing the claimed injury to Silkwood or her personal property, *there was no evidence of any violation which was shown to be the cause of Silkwood's alleged injuries or the damage to her personal property.*[10] *See* discussion

[10] Significantly, the appellant has not cited a single case in which punitive damages have been awarded despite compliance with a

(Footnote continued on following page)

pp. 5-6, *supra*. The alleged misconduct on which Silkwood sought to base the punitive damage award had to do with the general operation of the facility and the alleged general attitude of the company with respect to safety. Thus, it is clear that any award of punitive damages in this case would be nothing more than an attempt to regulate generally the operation of the plant. As such, it is clearly preempted under the Atomic Energy Act and by the reasoning of the *Northern States* case and its progeny.

The Purpose Underlying the Price-Anderson Act Is Inconsistent With an Award of Punitive Damages.

The appellant's reliance on portions of the legislative history of the Price-Anderson Act is misplaced. The complete legislative history of the Act demonstrates that its two basic purposes are to assure the availability of funds to compensate victims of a catastrophic nuclear incident and to encourage private industrial participation in the nuclear energy program. S. Rep. No. 650, 89th Cong. 1st Sess. 4, *reprinted in* 1965 U. S. Code Cong. & Admin. News 3209, 3212. That the Price-Anderson Act contemplates public liability protection for *compensatory* rather than punitive damages is evidenced by section

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(Footnote continued from preceding page)

preemptive federal regulatory scheme. Rather, he relies on this Court's decision in *Nader* v. *Allegheny Airlines, Inc.*, 426 U. S. 290 (1976). J. S. at 19. That decision, unlike the subsequent court of appeals decision in the same case, dealt with primary jurisdiction rather than federal preemption, and did not address the question of punitive damages. The Court simply held that a particular section of the Federal Aviation Act was not inconsistent with and did not abrogate common law liability for misrepresentation. The question of punitive damages *was* subsequently considered by the court of appeals, which held that the award of punitive damages was *improper* because there had been compliance with the federal regulations involved. *Nader* v. *Allegheny Airlines, Inc.*, 626 F. 2d 1031, 1035 (D. C. Cir. 1980). *See* discussion at p. 20, *infra*.

2210(c) (limiting government indemnity to $500,000,000), section 2210(e) (limiting total liability of licensees to $560,000,000), and section 2210(o) (authorizing the district court to supervise distribution of limited fund to claimants, and to establish priorities between claimants and classes of claims). If punitive damages were recoverable, the Act's dual objectives would be defeated. The risk of impediments to private development would not be removed, and "windfall" punitive recoveries to some claimants could reduce the amount available as compensation to other claimants. In short, in this comprehensive Congressional scheme for public liability protection, there is no justification—no *raison d'être*—for punitive damages. Thus, the reference to state tort law in the legislative history must be read as referring to state tort law for purposes of compensation.

In focusing on Price-Anderson, the appellant has lost sight of the legislative history of the Atomic Energy Act as a whole (which specifically governs the operation of Kerr-McGee's plant). This history shows explicitly that Congress intended that radiological hazards be subject to exclusive federal control. *Northern States, supra.* Punitive damages would clearly conflict with this intention. *See* Comment, *Implied Preemption of Punitive Damages,* 29 American U. L. Rev. 741, 767 (1980) ("Although a goal of Price-Anderson may have been to keep interference with state tort law to a minimum, it clearly did not authorize states to regulate radiation hazards through the granting of punitive awards.").

The Tenth Circuit Opinion Does Not Deprive Citizens of Any Common Law or Constitutional Rights.

The appellant's argument that the Tenth Circuit's decision on punitive damages deprives citizens of a fundamental right to be compensated or made whole for wrongs committed against them ignores the nature of punitive damages. As noted above, the purpose of punitive damages is not to compensate the

plaintiff. Indeed, to the plaintiff, punitive damages are a windfall because their purpose is to punish the defendant and to deter future conduct. They are, in effect, a common law substitute for a legislative fine or penalty, except that the money goes to the plaintiff rather than the state. The decision below leaves intact whatever rights a citizen may have under state law to recover for any loss or damage he has incurred, while at the same time preserving the federal government's exclusive interest in deterring or punishing improper conduct relating to radiation hazards. The appellant argues that the imposition of punitive damages lies within a state's "police powers" and therefore, preemption should not be readily inferred. J. S. 17-19.[11] The purposes underlying the Atomic Energy Act, however, show that Congress specifically considered the health and welfare of the public in determining that the AEC, an agency with expertise and experience in radiological matters, is best equipped to evaluate potential hazards and protect the public health and safety. *See* discussion of *Northern States, supra.*

Nor does the Tenth Circuit's decision create equal protection or due process problems for failure to provide a substitute for punitive damages. J. S. at 26-27. As this Court stated in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 88 (1978), "it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common

[11] Appellant claims that when state police powers are involved, "the presumption should be against federal preemption of the state law," J. S. 19 & n.27. The cases cited for this proposition, however, merely state: "in the absence of compelling Congressional direction, we could not infer that Congress had deprived the States of the power to act." *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 244 (1959); *New York Telephone Co.* v. *New York Labor Dept.*, 440 U. S. 519, 540 (1979). In the area of radiological hazards, the relevant legislative history and case law clearly demonstrate a compelling Congressional direction that state law be preempted.

law or provide a reasonable substitute remedy," citing several cases, *e.g., Silver* v. *Silver,* 280 U. S. 117, 122 (1929) (the "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object"). Moreover, there *is* a *quid pro quo* here. Extensive regulation by a federal agency for the protection of the public has been established, with sanctions such as heavy fines and license revocation available and often invoked, to secure compliance, deter prospective wrongdoers, and punish offenders. *See, e.g., Wall Street Journal,* March 22, 1982, at 14 (Boston Edison pays $550,000 fine levied by NRC).

The appellant's argument that an NRC licensee could intentionally contaminate someone and be immune from punishment (*e.g.* J. S. 12) is fatuous. Such an assertion has no application to this case, where there was no evidence that either Silkwood or her personal property were deliberately contaminated by Kerr-McGee. R. vol. 52, pp. 3-4. If some other case arose in which the evidence did show that a licensee deliberately contaminated someone, it is inconceivable that the NRC would fail to take action, including federal criminal prosecution, to punish the offender. *See* 42 U. S. C. §§ 2272-73.

The appellant cites no authority for the proposition that there is a constitutional right to punitive damages. Moreover, it is this Court's policy to avoid unnecessary adjudication of federal constitutional questions where independent state grounds support the decision below. *See City of Mesquite* v. *Aladdin's Castle, Inc., supra,* 102 S. Ct. at 1077.

B. It Was Unnecessary for the Tenth Circuit to Reach the Federal Preemption Issue Upon Which the Appellant Relies Here for Jurisdiction.

The Jurisdictional Statement here is fundamentally flawed. The appellant has sought to present questions for review here in a posture that erroneously suggests that the only action of the

court below was to reverse the punitive damage award, ignoring the first holding of the Tenth Circuit that Silkwood's exclusive remedy for personal injuries was under Oklahoma's worker's compensation laws. By virtue of this holding under state law, which is not presented here for review, the underlying basis for a punitive damage award no longer exists and any federal question presented is not substantial.

The court below correctly reversed the award of compensatory damages for personal injuries awarded to Silkwood because the exclusive remedy for such claims is provided under the Oklahoma worker's compensation laws. In fact, the same exclusivity applies to punitive damages as well as compensatory damages. The liability prescribed under the worker's compensation laws is ". . . exclusive and in place of all other liability of the employer and any of his employees, at common law or otherwise. . . ." 85 O. S. §§ 11-12, A. 63.

Moreover, in Oklahoma as in virtually all jurisdictions, there is no independent cause of action for punitive damages, they being only incidental or collateral to an underlying compensatory damage claim. *Gilbreath* v. *Phillips Petroleum Co.*, 526 F. Supp. 657, 659 (W. D. Okla. 1980). In the absence of compensatory damages, there can be no recovery of exemplary damages. *Brown* v. *Higby*, 191 Okla. 173, 127 P. 2d 195, 196 (1942). The only compensatory damage award which remains in this case, as it is presented to this Court, is the stipulated sum of $5,000 for Silkwood's personal property, which was removed from her apartment by Kerr-McGee during the decontamination process. It cannot seriously be contended that the contamination of this property, under circumstances unexplained by the plaintiff, could be a proper predicate for an award of $10,000,000 in punitive damages.

Oklahoma law requires that punitive damages must bear a reasonable relationship to the injuries sustained by the plaintiff "*and* the cause thereof." (Emphasis added). *Hobbs* v. *Wat-*

kins, 481 P. 2d 746, 754 (Okla. 1971). *See also Misco Leasing, Inc.* v. *Keller*, 490 F. 2d 545 (10th Cir. 1974); *Dearmore* v. *Gold*, 400 F. 2d 887 (10th Cir. 1968). The $10,000,000 award of punitive damages has *no* relationship, much less a reasonable relationship, to the compensatory award for property damage or its cause. Indeed, the appellant not only failed to prove how the property damage came about, but his counsel readily conceded that he had no explanation of the circumstances of the apartment's contamination:

> [W]e concede to the jury and concede to the Court that we can't satisfy the mechanism by which the plutonium got from the Cimarron Facility into Karen Silkwood's apartment and into her lungs, and we concede that point. . . . R. 3443.

This case was tried as a personal injury action. The complaint, the evidence, the instructions, and the rulings on the post-trial motions all point to the inescapable fact that the asserted basis for the punitive damage award here was the relationship between Kerr-McGee's alleged misconduct and the alleged personal injury of Silkwood, not the comparatively nominal damage to her personal property. *See, e.g.*, J. S. App. at 42a, 44a, 85a, 94a, 95a, 96a, 99a, 103a, 109a.[12] Since the only possible basis for a punitive damage claim, the claim for personal injuries, is barred, the punitive damage claim based thereon is likewise barred.

The federal preemption issue, although correctly decided by the Tenth Circuit, need not have been reached below as the

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[12] The court's affirmance of the property damage award of $5,000 was on the theory of strict liability and not on any wrongful act or omission by Kerr-McGee. J. S. App. 18a-21a. Indeed, the jury was instructed that recovery can be had under such a theory even though the defendant "has exercised the utmost care to prevent the harm to the plaintiff." J. S. App. 99a. Manifestly, the required fraud, malice or oppressive acts in relation to the property damage and its cause are not present.

punitive damage award could not stand in any event under controlling state law principles. *See, e.g., Flournoy* v. *Wiener,* 321 U. S. 253, 262 (1944). Plenary consideration of this case is clearly inappropriate where any decision would be purely academic or advisory in nature. *Cf. Rice* v. *Sioux City Memorial Park Cemetary,* 349 U. S. 70, 74 (1955) ("This Court does not sit to satisfy a scholarly interest in such issues."). This Court should decline the appellant's invitation to explore a tangential federal question not necessary to the summary affirmance of the decision below.

C. There Are Additional Non-Federal Grounds Which Preclude Any Punitive Damage Award.

There are two further independent grounds for denying punitive damages, which were not considered by the Tenth Circuit. Since the appellant is barred from recovering punitive damages on these alternate grounds, this Court should summarily affirm the decision below.

Compliance With Relevant AEC Regulations Precludes the Award of Punitive Damages.

The record is clear that Kerr-McGee was in compliance with AEC regulations as they related to Silkwood's alleged injury and property damage. The AEC conducted an exhaustive investigation, (Defendants' Exhibit 37, A. 1, *et seq.*) which conclusively establishes compliance by Kerr-McGee with AEC regulations relevant to Silkwood's claims. Where there has been substantial compliance with a pervasive regulatory scheme, punitive damages cannot be awarded, irrespective of preemption. The regulated party may not be condemned as a wanton wrongdoer for conforming to the standards set and the practices approved by the agency charged with the duty of regulating the conduct. *Nader* v. *Allegheny Airlines, Inc.,* 626 F. 2d 1031, 1035 (D. C. Cir. 1980).

Even if not preempted by statute, punitive damage awards are prohibited where they have the potential of interfering with a regulatory scheme and of creating a chilling effect, impairing the activities of parties otherwise subject to regulation. *International Brotherhood of Electrical Workers* v. *Foust*, 442 U. S. 42, 52 (1979) (setting aside a punitive award against a labor union for alleged breach of duty of fair representation); *see also Harrison* v. *Indiana Auto Shredders Co.*, 528 F. 2d 1107, 1123-26 (7th Cir. 1976) (where proper regulatory agency finds a licensee to be in compliance with license requirements, a court cannot go behind such a finding and award punitive damages based on the regulated conduct). Here Kerr-McGee's compliance with relevant AEC regulations is clear and precludes any recovery of punitive damages.

Punitive Damages May Not Be Awarded Without Evidence of Malice or Wanton Conduct.

Punitive damages are authorized in Oklahoma only where the very act causing the injury was actuated by or accompanied with evil intent or was the result of such gross negligence as to be the equivalent to evil intent. *See, e.g., Schuman* v. *Chatman*, 184 Okla. 224, 86 P. 2d 615, 618 (1938). At trial, the appellant did not prove or even attempt to prove any act causing damage and conceded that no such act or omission of Kerr-McGee could be identified. *E.g.*, R. 3443. *A fortiori*, there could not be any *proof of evil intent.* Even if the doctrine of federal preemption had not been applied, and even if Oklahoma's worker's compensation laws had not been held to be the exclusive remedy for personal injuries, the punitive damage award could not stand. Simply stated, the appellant may not concede a total failure of proof of the conduct underlying a claimed damage and recover a punitive award based solely on the fact of the damage.

CONCLUSION

For all of the foregoing reasons, this appeal should be dismissed or, in the alternative, the judgment below should be summarily affirmed.

Respectfully submitted,

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Kerr-McGee Nuclear Corporation is a wholly-owned subsidiary of Kerr-McGee Corporation. The following are non-wholly-owned subsidiaries or affiliates of Kerr-McGee Corporation: Kerr-McGee of Canada Northwest, Ltd.; Kerr-McGee Oil (U.K.) Ltd.; San-Ann Premium Center, Inc.; Sunningdale Oils (Abu Dhabi), Ltd.; Sunningdale Oils (Ireland), Ltd.; Transocean Drilling Company, Ltd.; Transocean Drilling (Curacao) N.V.; Transhore Drilling (Curacao) N.V.; Transworld Drilling Company (Nigeria), Ltd.; White Shoal Pipeline Corporation; Basic Management, Inc.; Bitita Minerals (Private), Ltd.; Crescent Petroleum Company; Downtown Airpark, Inc.; Little Medicine Development Company; Oklahoma Stations, Inc.; and Texoma Pipe Line Company.

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DEFENDANTS' EXHIBIT #37

RO INVESTIGATION REPORT NO. 74-09
DIRECTORATE OF REGULATORY OPERATIONS

REGION III

Subject: Kerr-McGee Nuclear Corporation Cimarron Plant
Crescent, Oklahoma
License No. SNM-1174 (Docket No. 70-1193)

An employee and her residence were found to be contaminated with plutonium on November 7, 1974.

Period of Investigation: November 8 to December 4, 1974

Investigators:

W. L. Fisher — 12/16/74 (Date)

J. A. Finn — 12/16/74 (Date)

K. R. Ridgway — 12/16/74 (Date)

J. H. Douglas — 12/16/74 (Date)

R. L. Sullivan — 12/16/74 (Date)

G. A. Phillip — 12·16·74 (Date)

Reviewed By:

J. A. Hind
Materials & Plant Protection Branch — 12/16/74 (Date)

J. M. Allan, Chief
Radiological and Environmental Protection Section — 12-16-74 (Date)

SCOPE OF INVESTIGATION

During the period November 8 to December 4, 1974, Regulatory Operations investigated the radiation protection and materials safeguards aspects of an incident involving contamination of a Kerr-McGee Nuclear Corporation employee (Individual A) and her apartment, and lesser contamination of her roommate (Individual B). The investigation was intended to discover the cause and extent of the contamination and to determine whether significant exposure resulted to employees. Individual A died in an automobile accident on November 13, 1974. The cause of this death is not within the jurisdiction of the AEC and therefore was not pursued during the investigation.

CONCLUSIONS

The investigation did not reveal exactly how the contamination occurred. However, several conclusions have been drawn from available evidence:

1. Individual A's personal contamination on November 5, 6, and 7 probably did not result from an accident or incident within the plant.

2. Two urine samples submitted by Individual A contained plutonium which was not present in the urine when it was excreted.

3. Individual A did not inhale a significant quantity of plutonium.

4. Individual A did ingest some plutonium on or about November 7, 1974.

5. Individual A's body organs and tissue contained a small amount of plutonium; less than one half the maximum permissible body burden.

6. Individuals B and C did not receive a biologically significant internal deposition of plutonium.

7. The quantity of plutonium released to the Edmond, Oklahoma, sewage treatment plant was probably insignificant.

8. No more than 0.0003 grams of plutonium were identified in the contamination of the individuals and their apartment.

9. No contamination was detected external to the apartment shared by Individua A and B and the bodies of these individuals and only a very small amount of contamination was found in individual A's automobile.

REASON FOR INVESTIGATION

Based upon telephone notification by the licensee on November 7, 1974, that: an employee was found to have contamination on portions of her body upon reporting to work that morning; bioassay samples she brought with her showed significant levels of radioactivity through a preliminary check; and, the apartment she shared with another female employee was found contaminated, Region III immediately initiated an investigation.

SUMMARY OF FACTS

At approximately 6:30 p.m. Tuesday, November 5, 1974, a Lab Analyst, hereafter referred to as Individual A, who was working in Glove Box No. 3 in the Metallography Laboratory, Room 135, of the licensee's plutonium plant checked her hands on a monitoring instrument mounted on the glove box and discovered that they were contaminated. She so informed another lab analyst who notified the plant Health Physics Office and requested assistance. Individual A was taken to the Health Physics Offices for decontamination and Room 135 was placed on respirator status, that is, respirators must be worn to enter, while two glove box gloves, which were found to be contaminated on their outside (handside) surfaces, were replaced. These gloves were subsequently tested by Kerr-McGee personnel and no leaks were found. Smear surveys of Room 135 showed no contamination. The air sample filter papers from the two air sample heads in the room showed essentially no airborne activity had been detected during the time Individual A had been in the room. By 9:00 p.m. Room 135 was taken off of respirator status and Individual A's decontamination completed. She returned to the laboratory, developed film and performed other miscellaneous paperwork but performed no work in the glove boxes. She stated she monitored herself as she left the plant at about 1:10 a.m. and detected no contamination. She was provided urine and fecal kits, specifically made up for her by a health physics technician. As a precautionary measure she was placed on a total collection bioassay program for the following five days because of the contamination occurrence.

On Wednesday, November 6, she arrived at the plant at about 7:50 a.m. and spent the next hour examining metallographic prints and performing paperwork. She performed no glovebox work that day. At 8:50 a.m. she prepared to leave the laboratory to attend a union negotiating meeting with plant management in her capacity as a representative of Local 5283 of the Oil Chemical and Atomic Workers Union. While monitoring herself as she exited, she detected contamination on her hands. A survey made by health physics personnel revealed some contamination on her hands, right forearm, and the right side of her neck and face. Her hands were successfully decontaminated and since the other spots were fixed contamination she was released by Health Physics to attend the meeting

with the understanding she would report back to Health Physics before going home.

She reported back to the Health Physics Office at approximately 4:30 p.m., underwent further decontamination of the earlier identified fixed contamination and was released by the health physics technician when contamination had been reduced to less than 500 d/m (disintegrations per minute).

At her request a health physics technician checked her locker at the plutonium plant and her personal auto and no contamination was found. Prior to leaving the plant, she was instructed to report to the Health Physics Office the next morning for another nasal smear before going into the laboratory to work.

On Thursday, November 7, she reported to the Health Physics Office at about 7:30 a.m. bringing with her a urine kit containing four urine samples and one fecal kit. When a nasal smear was taken significant contamination levels were detected in and around her nose and lower levels of contamination were found on other parts of her person. For this reason, while she was undergoing decontamination, the bioassay samples were given a preliminary check on a wound counter and found to have high levels of activity. Her locker and automobile were again checked and essentially no contamination was found.

Following her decontamination on November 7, she was accompanied by Kerr-McGee Health Physics personnel to her apartment in Edmond, Oklahoma which she shared with another lab analyst, hereafter referred to as Individual B. A survey of the apartment revealed significant levels of contamination in the bathroom and kitchen and spots of lower level contamination in other rooms. No contamination was found outside the apartment.

Individual B, who was asleep in the apartment having worked from midnight to 8 a.m., was awakened and checked for contamination. Two areas of low level contamination were found on her person. Individuals A and B and the Health Physics personnel returned to the licensee's plant where Individual B was decontaminated and preparations were made to initiate decontamination of the apartment. Individuals A and B were placed on a bioassay sampling program by the licensee.

Decontamination of the apartment was begun November 7 and continued intermittently to December 2. Final surveys by the licensee on December 3, 1974, showed no contamination levels greater than 2 d/m per 100 square centimeters. Representatives of the State of Oklahoma Department of Health and Region III concurrently performed direct reading and smear surveys of the apartment on December 3, 1974. By letter dated

December 10, 1974, Region III advised the State of Oklahoma Department of Health that the Region III survey results showed contamination levels within the apartment are below those specified in an AEC guideline for the release of facilities and equipment for unrestricted use.

Two individuals who had visited the apartment during the period November 5-7 were subsequently checked. No contamination was found on either individual. One individual had visited the apartment on November 5 and the other, hereafter referred to as Individual C had spent the night of November 6 in the apartment. On November 9, Individuals A and B were seen by the licensee's medical consultant, and by a medical consultant retained by the Region office on this case. Arrangements were made for Individuals A, B and C to go to the Los Alamos Scientific Laboratory on November 11 for in vivo counting.

On November 12, the three individuals returned from Los Alamos. Individuals A and B returned to work on November 13 and were restricted from further radiation work by Kerr-McGee. Between 7 and 8 p.m. on November 13, Individual A died in an automobile accident. The State of Oklahoma Medical Examiner's Office certified the death as accidental and stated that the accident was in no way related to radiation exposure.

The data obtained through analysis of urine samples submitted to the Health Physics Office by Individual A, at about 8:00 a.m. on November 7 indicated a significant inhalation of plutonium might have occurred. A examination of health physics records for the plutonium plant for the period July 15-November 8 including all employee personnel bioassay data, air sample records, constant air monitor records, as well as smear and survey records and interviews with plant personnel provided no information regarding an occurrence to which an inhalation of plutonium of the magnitude indicated by Individual A's November 7 urine samples could be attributed.

The in vivo counts performed by Los Alamos Scientific Laboratory on November 11 revealed no detectable plutonium (i.e., less than the Minimum Detectable Activity of 8 nanocuries) in any of the three individuals. However, Individual A's lungs were found to contain about 0.3 nanocuries of Am-241. An examination of tissue and internal organs obtained through post-mortem of Individual A on November 14 revealed the presence of some plutonium, primarily in the lungs and liver.

Data obtained through analysis of urine samples submitted subsequent to November 7 indicate that a significant inhalation did not occur. This inconsistency, together with the whole body count data and the post-mortem examination, indicates that two urine samples (Appendix I, No. 25 and No. 27) contained activity that had been added to the samples. This investigation, however, did not establish how or by whom the activity was added.

An evaluation of the bioassay data indicates that Individual A did ingest some plutonium in the recent past. This investigation, however, did not establish how or when this occurred.

All of the bioassay data and in vivo count data relating to Individuals B and C showed that neither of them had received a biologically significant internal deposition of plutonium.

The total amount of plutonium found in personal and apartment contamination is estimated to have been less than 0.0003 grams.

An effort has been made to include all available information in this report. However some data, such as additional bioassay information, which was not available at the time this report was prepared will be furnished at a later date.

The Department of Health, State of Oklahoma was notified of the incident by the licensee on November 7, 1974 and representatives of that office participated in parts of this investigation.

Region III issued a news release on November 8 regarding the incident and provided information and responded to press inquiries during the ensuing investigation. The incident received wide coverage by all news media.

As a result of this investigation certain activities under License No. SNM-1174 appear to be in violation of AEC requirements as indicated below. A violation considered to be of Category III severity is as follows:

Condition No. 22 of AEC license SNM-1174 requires a urinalysis program. Atomic Energy Commission regulations, 10 CFR Part 20.401(c), require that ". . . . records of bio-assays . . . . shall be preserved . . . . ."

Contrary to the above, the voiding dates and identity of two highly significant urine samples are not known by the licensee. (See "Urine and Fecal Analyses.")

DETAILS

Personnel Contacted

Forty Kerr-McGee employees, including nineteen members of management, were contacted during the investigation. Others contacted included:

A representative of the Oil, Chemical and Atomic Workers International Union
An apartment building owner
An Oklahoma State Highway Patrol Trooper
A Ford dealer
The Oklahoma State Medical Examiner
Kerr-McGee Nuclear Corporation's medical consultant
Three representatives of the Department of Health, State of Oklahoma

Sources of Information

Information contained in this report was obtained through interviews, examination of records, observations, and independent measurements by the AEC.

Chronology of Events

On November 5, 1974, Individual A, a Laboratory Analyst, reported for work at the licensee's plutonium plant at 1:20 p.m. after having been absent from work during the period November 1-4, 1974. At that time she was presented with a reprimand by her supervisor for having taken a prescription drug, Tylenol 3, at work on October 31 without informing her supervisor as required by company policy.

Individual A proceeded to perform miscellaneous paperwork in the Metallography Lab, Room 135, while wearing a smock. At about 2:45 p.m., as Individual A and her supervisor monitored themselves as they were leaving the work area to take a break, the supervisor detected a contaminated shoe cover. They remained in the work area while the supervisor changed shoe covers and called the Health Physics Office. A health physics technician checked the laboratory floor and the supervisor's feet. At 3:15 p.m. Individual A and the supervisor left the laboratory to take a work break and in monitoring herself, she found no contamination on her person. She returned to the laboratory at about 3:30 p.m., performed some paperwork and labeling. At 3:45 p.m., she put on coveralls and lightweight plastic gloves which she taped to her wrists. She started working in the glove boxes, first grinding plutonium samples in glovebox No. 6. Later she polished samples and cleaned them ultrasonically in glovebox No. 3. At 5:30 p.m., Individual A checked her hands and arms and found no contamination. She removed her coveralls and took a break. At about 5:45 she returned to the laboratory, put on coveralls and performed more sample grinding in glovebox No. 6. She also performed more sample polishing and ultrasonic cleaning in glovebox No. 3. After performing some polishing work in glovebox No. 4, she returned to glovebox No. 3 for glovebox cleanup.

At about 6:30 or 6:45 p.m., she withdrew her hands from glove box No. 3 gloves and, as procedures required, checked her hands with a monitoring instrument mounted on the front exterior of the glovebox. She found them contaminated and called another lab analyst working in an adjacent laboratory room to obtain a health physics technician for assistance. Upon arrival, the Health Physics Technician found contamination up to 20,000 d/m* (disintegrations per minute) on the right sleeve and shoulder of her coveralls. A female safeguards clerk was called in to assist in surveying and decontaminating her. When changing coveralls, Individual A's left hand was found to be contaminated. Because of this, she put on a clean pair of gloves, which she did not remove until she entered the shower. A survey before showering revealed contamination on the left hand, right wrist, and upper arm, neck, face, and hair, the highest level being 10,000 d/m on the right wrist. Nose smears showed a maximum contamination level of 160 d/m. Nasal irrigation reduced this to a maximum of 3 d/m. During the course of irrigating her nostrils, Individual A informed the health physics technician her left nostril was blocked as a result of a broken nose she received as a child.

After showering and washing her hair, she was placed under a hair dryer for 30 to 45 minutes. A final survey revealed no contamination greater than 500 d/m. She was released to return to work.

A urine kit and a fecal kit were prepared for her use by a health physics technician and she was requested to begin a total collection program which was to last for the next five days. Between 9 and 10 p.m. these kits, which bore a label with her name and badge number, were placed on a shelf situated for this purpose in the hallway leading to the air lock through which all personnel must pass.

The extra kits were provided to Individual A so that she could begin a five day total collection program even though it was recognized that she probably had at least one urine kit at home, since she had earlier been placed on a weekly sampling schedule because of an occurrence on July 31, 1974. Additional information concerning that occurrence is provided elsewhere in this report.

When Individual A reported her contamination at 6:45 p.m., the filter papers in the two air sample heads in Room 135 were changed. The room was placed on respirator status, a routine precautionary measure which is taken while the room is checked to find and eliminate the source of the contamination. A health physics technician surveyed the room and found no contamination except on two of the three gloves in glovebox No. 3. The right glove read 5,000 d/m direct reading and the middle glove to which it was tied showed 2,000 d/m direct reading. The two gloves were found entwined which is normally done when an individual withdraws from them to prevent them from being pulled into the box by negative air pressure. Two shoe covers were found in the room, one reading 2000 d/m and the other about 500 d/m. With the assistance of a lab analyst, a health physics technician removed the two contaminated

*The licensee's decontamination release limit is 500 d/m. The AEC's decontamination release limits for facilities and equipment are given in Appendix F, pages 3-6.

gloves from the glove ports, stored them inside the glovebox and installed new gloves. The room was taken off respirator status at 9 p.m. and the air sample filter papers were changed again.

The following are the results of the air samples for the period 4:00 p.m. to midnight, November 5, 1974.

Time	Sampler No.	Concentration (microcuries per milliliter)
4:00 p.m.-6:45 p.m.	18	6×10^{-13}
	19	6×10^{-13}
6:45 p.m.-9:00 p.m.	18	3×10^{-12}
	19	$< 7 \times 10^{-13}$
9:00 p.m.-Midnight	18	5×10^{-13}
	19	5×10^{-13}

AEC regulations permit average airborne plutonium concentrations in occupied, restricted areas up to 2×10^{-12} microcuries per milliliter for forty hours in any period of seven consecutive days.

The gloves removed from glovebox 3 were visually examined by Kerr-McGee personnel and tested for holes by filling them with water on November 7. No holes were found. A Region III representative witnessed a second test of the gloves on November 12 and no holes were found. (Appendix A)

After being decontaminated, Individual A returned to Room 135 at 9 p.m., developed film and performed miscellaneous paperwork but did no more work in the gloveboxes. She stated she left work at 1:10 a.m., monitored herself as she exited and found no contamination.

On Wednesday, November 6, Individual A arrived at work at about 7:50 a.m. She put on a smock and performed miscellaneous paperwork. At 8:50 a.m. upon leaving the laboratory to attend a meeting, Individual A detected contamination on her hands. She went to the Health Physics Office for decontamination. Surveys performed there detected contamination levels up to several thousand d/m on her hands, right forearm and the right side of her neck and face. Her hands were successfully decontaminated and since the other spots were fixed contamination she was released by the health physics staff to attend a meeting which was being held in the office area in the Uranium Plant Building. The meeting, which she attended as a representative of Local 5283 of the Oil Chemical and Atomic Workers Union along with two other representatives, was a negotiating meeting with plant management.

The meeting recessed at noon and Individual A obtained permission from the health physics office to leave the site for lunch with the other union representatives. The meeting was resumed at about 1:30 p.m. and was concluded at 3:15 p.m. She and the other union representatives left the plant for further discussions and returned to the plant at 4:30 p.m.

Individual A then went to the Health Physics Office as she had been instructed that morning. She was surveyed with the assistance of a female employee and contamination up to 5,000 d/m was found on her right forearm, neck and face. A survey after decontamination indicated no contamination greater than 500 d/m. It was decided she should allow her skin and hair to dry more thoroughly and to survey her again. A final survey performed 30 minutes later showed no contamination greater than 500 d/m.

After decontamination, Individual A requested that a nasal smear be taken. The smear from one nostril showed about 170 d/m and the other showed about 30 d/m. A resmear of the higher reading nostril showed about 30 d/m. Since Individual A appeared to the health physics technician to be upset, he pursued the matter no further. The health physics technician, however, was concerned that the nose smears had shown anything, since she had not been in a radiation zone except for one hour that morning. He therefore, requested that she return to the Health Physics Office for another nasal smear when she reported for work the next morning. As she prepared to leave, Individual A requested a health physics technician survey her locker and her automobile. These surveys were made and essentially no contamination was detected. She left the plant at about 7 p.m.

On Thursday morning, November 7, Individual A reported to the Health Physics Office at about 7:30 a.m. She brought with her one fecal sample which was voided Wednesday night and four urine samples. Nasal smears of each nostril were taken and they showed 45,000 d/m. Direct surveys showed 40,000 d/m on and around her nose and 4,000 d/m on the back of her right hand and the thumb side of her left index finger. Nasal smears taken after nasal irrigation showed a maximum of 300 d/m. A survey of individual A's body showed contamination levels from 1,000 to 3,000 d/m on her hands, arms, chest, back, neck, and right ear. Showering reduced the contamination to less than 500 d/m. Nasal smears then showed a maximum of 150 d/m.

In view of the nasal smear results, the outside surfaces of the urine and fecal containers were smeared and found to be clean. The samples were taken to the plant's emergency building where a preliminary check of the samples was made using a sodium iodide scintillation wound counter. The four urine samples which were collected Tuesday night, Wednesday morning and night, and Thursday morning showed count rates of 170, 204, 137, and 139 counts per minute indicating significant activity in the samples. Since all count rates were similar, the samples were composited, and half of the combined sample or 500 ml was sent to the Kerr-McGee Technical Center for analysis. A 250-ml aliquot was subsequently sent to the AEC Health Services Laboratory for analysis. The remainder, about 250 ml was retained at the plant.

The fecal sample which was obtained Wednesday night, November 6, was also checked with the wound counter. Count rates of about 30,000 to 40,000 counts per minute were measured with the detector against the container. This sample was also sent to the Kerr-McGee Technical Center for analysis.

While Individual A was undergoing decontamination, surveys were made of the women's locker room, including the inside of her locker, the employee lunch room and her automobile. No contamination was found. Preparations were then made for health physics personnel to accompany Individual A to survey her apartment which she shared with another lab analyst, Individual B, who had worked from midnight to 8 a.m. that morning.

Upon arrival at the apartment at about 2 p.m., Individual B was awakened and surveyed. Two areas, hands and buttocks, were found to be contaminated to about 2,000 d/m.

The initial apartment survey revealed spotty contamination throughout the apartment, but primarily in the bathroom, kitchen and Individual A's bedroom. The highest contamination levels found were 100,000 d/m on the toilet seat and 400,000 d/m on a package of cheese and bologna in the refrigerator.

Individuals A and B and the health physics personnel returned to the plant where Individual B was decontaminated. A resurvey of Individual A at this time showed no contamination levels above 500 d/m. Nasal smears obtained from Individual A showed a maximum of 24 d/m.

Preparations were made for apartment decontamination which was begun later that day. From that time on, the two employees did not again occupy that apartment. They did, however, return to the apartment that evening to be present while the apartment's contents were surveyed and various contaminated items removed for storage at the Kerr-McGee Plant. Individual A did not re-enter the apartment but remained outside.

On November 6, Individual B had worked from midnight to 8 a.m. After leaving work, she had stopped to feed her horse in the stable where it was kept. During the day, she had attended classes at a nearby college. She also cleaned the apartment using two vacuum cleaners and washed some clothes. In the late afternoon or early evening she fell asleep on the couch and was awakened by Individuals A and C at about 10 p.m. Individuals A and C left the apartment and returned with pizza, beer and soft drinks which the three of them consumed while sitting on the living room floor.

Individual B prepared a ham sandwich using bread and meat from the refrigerator, placed it in a plastic bag and in turn into a paper bag along with some orange juice for her lunch at work. She left the apartment at about 11:30 p.m. to report for work at midnight. Upon arrival at the plant, she placed her lunch in the lunch room refrigerator.

Individual B stated that she left work at about 8 a.m. on November 7, stopped to feed her horse again and went immediately to the apartment. As she entered the apartment, she heard the telephone ringing and answered it using the instrument located in Individuals A's bedroom, Individuals A and B having separate bedrooms. Individual B stated that the telephone call was from Individual A informing her that plant personnel would be coming to the apartment to check for contamination. Individual B stated that she then went to the bathroom and from there into her bedroom where she disrobed and went to bed.

Individual A stated that she had collected the fecal sample, which she brought to the plant on November 7, immediately following her arrival at the apartment at about 7:30 p.m. on the evening of November 6. Individual C stated that when he arrived at the apartment at about 9 p.m. Individual A was talking on the telephone. When she finished her call, they awakened Individual B and went out for the pizza. Individual C stated that he and Individual A remained in the apartment after Individual B had departed for work. They listened to records and retired at about 1 or 2 a.m. Individual C said they arose the following morning about 6:30 a.m. Individual C went to his residence, changed clothes and went to work.

Individual A stated that she obtained a urine sample on the morning of November 7 and spilled some of the contents of the container. She wiped off the container and bathroom floor with tissue which she disposed of in the commode. She also recalled having taken some bologna from the refrigerator with the intention of preparing a sandwich for her lunch. She carried the bologna into the bathroom, placed it on the closed commode top. While in the bathroom she recalled that she had part of her Tuesday, November 5, lunch still at work and decided not to make a sandwich. She then returned the bologna to the refrigerator. She stated that she went directly to the Health Physics Office upon her arrival at the plant on the morning of November 7.

Through initial surveys at the apartment on November 7, a health physics technician ascertained that the pizza box and the empty beverage containers which were found in the waste basket, were not contaminated. The refrigerator in the plant lunch room, which was checked on the morning of November 7, was found free of contamination. The automobiles owned by Individuals B and C were surveyed by Kerr-McGee Health Physics personnel on November 7 and no contamination was found.

At their request, the vehicles of two other employees were surveyed on November 7 since Individual A had ridden in them on November 6. They were found free of contamination.

During the evening of November 7, Individual C was requested to come to Individual A's apartment where he and his automobile were surveyed by

Kerr-McGee personnel. No contamination was found. A Kerr-McGee health physics technician accompanied Individual C to his residence and surveys performed there detected no contamination.

On November 8, Individual A was absent from work. She was, however, interviewed by AEC representatives on that date. During this interview she requested that both she and her automobile be surveyed (See Appendix B). Individual A provided assurances that the total collection bioassay program was being continued. At the conclusion of the interview she provided four urine samples which she stated she had collected during the night of November 7 and on November 8. Individual A also stated that there were two urine samples in her locker at the plant and provided the locker key. These samples were obtained from the locker and sent to the Kerr-McGee Technical Center for analysis. During a subsequent partial interview with Individual A on November 13, she identified the larger of the two samples taken from her locker as having been collected during the week of October 27 - November 2. She stated the smaller sample had been collected while at the plant on November 7.

On November 9 Individuals A and B were seen by the licensee's medical consultant and an AEC medical consultant, who was retained by Region III for this case. Arrangements were made for Individuals A, B and C to be in vivo counted at the Los Alamos Scientific Laboratory. The three individuals accompanied by the Licensee's medical consultant departed for Los Alamos on November 10 and were counted on November 11 and 12. The data obtained from these counts are contained in Appendix C. Data obtained from earlier in vivo counting of these individuals by Helgeson Nuclear Services, Inc. are contained in Appendix D.. They returned to the Oklahoma City area on the night of November 12.

Individuals A and B reported for work on November 13 and were restricted from further radiation work. Individual A left the plant about 5 p.m. on November 13 and attended a union meeting in Crescent, Oklahoma. Upon the conclusion of the meeting at about 7 p.m., she left alone in her automobile. At 8:05 p.m. the Oklahoma State Highway Patrol received notification of an accident involving Individual A's car. The accident report indicated that 7.3 miles south of Crescent, Individual A's car, traveling south, had run off the east side of the highway and had traveled approximately 255 feet before hitting a concrete retaining wall. The Medical Examiner's report prepared by Dr. Robert E. Ringrose who examined the body at the Logan County Memorial Hospital, Guthrie, Oklahoma, on November 13 indicates the probable cause of death as multiple injuries.

Upon notification of the accident on November 13, Region III representatives and a Licensee representative, accompanied by a trooper of the Oklahoma State Highway Patrol performed surveys of Individual A's automobile and personal effects contained in it where it was impounded in Crescent.

Oklahoma. The accident scene, the Guthrie fire department ambulance and the personnel who had removed and transported the corpse were also surveyed. No contamination was found.

On November 14, a post mortem examination was performed at the State of Oklahoma Medical Examiner's Facility, Oklahoma City. Representatives from the AEC's Los Alamos Scientic Laboratory participated in the post mortem examination to obtain samples for analysis at the Los Alamos Scientific Laboratory. Analytical data are being furnished to the AEC medical consultant for inclusion in his evaluation.

Licensee personnel completed decontamination of the apartment on December 2. A report was prepared by the licensee containing data on the contamination found, the action taken and the results of smear surveys performed upon completion of the decontamination effort. A copy of this report is attached to this report as Appendix E.

On December 3 representatives of the State of Oklahoma Health Department and Region III concurrently performed direct reading and smear surveys of the apartment. By letter dated December 10, 1974, Region III advised the State of Oklahoma Health Department that the survey results showed contamination levels within the apartment are below those specified in an AEC guideline for the release of facilities for unrestricted use. A copy of the December 10 letter with the Region III survey results and the guideline are attached to this report as Appendix F.

Physical Protection

The Licensee's Physical Security Program was last inspected in September 1974. Two items of noncompliance which did not represent significant defects in the program were identified. The licensee's response in a letter dated October 26, 1974, indicates corrective action has been initiated which should bring the licensee's physical protection program into full compliance with requirements. The contamination found in the employee's apartment could have been caused by less than 0.0003 grams of plutonium. No larger amount of plutonium was identified off-plant during this investigation.

July 31, 1974 Occurrence

Prior to August 7, 1974, Individual A was assigned to the Emission Spectrography Laboratory, Room 133. On July 31-August 1, 1974, she worked from 4:00 p.m. to 4:00 a.m. The two air sample filter papers from Room 133 for the 4:00 p.m. to midnight shift were found to have high activity counts when analyzed. Individual A along with two other

employees who were also working in Room 133 during part of that period of time were requested to submit urine and fecal samples for the next four days. Individual A submitted fecal samples for August 1 and 6. The first urine sample submitted was from an August 6 voiding.

On August 16, 1974, the licensee informed Region III by telephone of the July 31 high air samples and stated that autoradiographs of the two air sample filter papers showed patterns not expected for a typical air sample. Bioassay samples from the three employees involved did not indicate an uptake of plutonium. In addition, an in vivo count (lung) of Individual A made by Helgeson Nuclear Services, Inc., on August 1, 1974, showed no detectable plutonium 239 or Americium 241. The licensee stated he did not consider this a valid exposure. The Region III representative advised him that his evaluation would be reviewed during a subsequent inspection.

On October 10, 1974, the licensee telephoned Region III to state that results of urine samples submitted for August 13 and August 25 had just been received. These results indicated possible uptake of plutonium. On the basis of the August 13 and August 25 sample results, the licensee submitted a report to the Commission dated October 16, 1974, which is attached to this report as Appendix G. Individual A is identified in the licensee's report as Employee A.

In that report the licensee stated: "The high-count air sample papers were alpha autoradiographed and the resulting photograph showed a pattern not expected for a typical air sample." A copy of that photograph was obtained and is attached to this report as Appendix H.

Bioassay sample data for Individual A for this period is as follows:

Date	Sample	dpm per Sample	Quantity of Sample
8/1/74	Fecal	0.5	148 grams
8/6/74	Fecal	< 0.3	214 grams
8/6/74	Urine	0.4	1000 ml
8/13/74	Urine	3.5	1100 ml
8/25/74	Urine	5.0	700 ml
9/12/74	Urine	< 0.1	800 ml
10/8/74	Urine	< 0.1	900 ml

Results on the urine samples submitted on September 12 and October 8 were received by the licensee subsequent to his submission of the October 16 report to the Commission. These samples as indicated above showed less than 0.1 disintegrations per minute per sample.

Decontamination Facilities and Methods

Personal decontamination at the plutonium plant is performed in a room adjoining the first aid room. Facilities include a sink, a bathtub with shower, and a respirator dryer which can also be used as a hair dryer.

If contamination is not removable by normal washing with soap and water, further decontamination is performed using Clorox and Tide. Potassium permanganate is available if needed for extremely persistent contamination.

Decontamination wastes flow to holdup tanks, which are sampled for analysis before discharge to the sanitary lagoon.

Kerr-McGee Radiochemical Analytical Capability

The Kerr-McGee Technical Center is responsible for analyzing urine and fecal samples for uranium and plutonium. The Kerr-McGee employee responsible for the program is a Ph.D radiochemist. The program was established during the spring of 1972.

Plutonium analysis is based on a paper entitled "Determination of Plutonium in the Environment by Extraction and Liquid Scintillation Counting" by J. P. Ghysels in Industries Atomiques and Spaciales, 1 (1972). Additional alpha liquid scintillation counting techniques are based on work done by J. L. McDowall at ORNL. The resultant procedures yield a chemical recovery of 98.5% ± 1.5%. Greater than a two thousandfold separation from the other actinides is obtained. The alpha detection limit is about 0.3 ± 0.13 d/m/l. Standardization is based on plutonium 239 reference sources (238-Pu + 241-Am < 1%, 240-Pu < 4%) obtained from Amersham Searle.

Before extraction, the ashed solids are acidified and filtered, resulting in liquid and solid fractions. The Kerr-McGee radiochemist stated, concerning oxides, the plutonium in the solid fraction would consist of material that had been fired at a temperature in excess of 700°C for at least one hour. Plutonium in the liquid fraction would consist of material that had been fired at a temperature of less than 500°C for at least one hour. Plutonium fired between 500 and 700°C would appear in both fractions. Plutonium in any other form is expected to be solubilized by the wet ashing procedure.

As stated previously, bioassay samples are normally counted by liquid scintillation. Other counting systems at the Technical Center which may be employed are a low background, gas flow, proporational counting system or a 1,024 channel analyzer coupled with either a 400 mm² surface barrier or NaI scintillation detector.

Urine and Fecal Analyses

Appendix I contains results of urine and fecal analyses performed for Individual A from the beginning of her employment at Kerr-McGee in

August 1972 until her death on November 13, 1974. During the period November 5 through November 13 she was on a total collection program.

Analytical differences among the participating laboratories cause minor difficulties in evaluating the bioassay data. For example Kerr-McGee and United States Testing report total plutonium, while Los Alamos reports Pu-238 and Pu-239 (the latter presumably including Pu-240), and the AEC Health Services Laboratory reports Pu-239/240 and Pu-238.

Where possible, Los Alamos and the Health Services Laboratory analyzed for Am-241 as well as plutonium. In some cases, samples having very small plutonium concentrations were not analyzed for americium, whose smaller concentration would have been difficult or impossible to measure.

The licensee was unable to identify voiding dates for sample Nos. 20, 22, and 23. Further, identity of the latter two samples was lost such that the analytical results cannot be assigned with certainty to the proper sample. The licensee, whose AEC license requires a urinalysis program, is therefore in violation of 10 CFR Part 20.401(c), which requires that records of bioassays be preserved.

Appendix J contains results of urine and fecal analyses performed for Individual B from the beginning of her employment at Kerr-McGee through November 1974.

Appendix K contains results of urine and fecal analyses performed for Individual C while employed by Kerr-McGee from August 1969 to September 1974, and during November 1974 as a result of the incident under investigation.

Isotopic ratios found in fecal and urine samples are compared in Appendix L with ratios found in other samples. Good agreement of Pu-239 to Pu-238 ratios was found. Except for two urine samples submitted by Individual A, (Appendix I, Nos 25 and 27) Pu-239 to Am-241 ratios agreed reasonably well. The two urine samples submitted by Individual A contained a higher percentage of Am-241.

Kerr-McGee Health Physics Records

A thorough audit of health physics records covering the period July 15 through November 22, 1974, revealed no plant conditions that could have caused a significant intake of plutonium. More than 3,600 pages of record material, outlined in Appendix M, were reviewed. Except for the instance described in the section of this report on Urine and Fecal Analyses, these records effectively document radiological conditions in the plant and the effect of such conditions on persons within the plant. Since the incident prompting this audit did not involve radioactive effluents, neither effluent nor environmental records were reviewed in depth during this investigation.

As evidenced by 1866 pages of "Air Sample Data Sheets" containing the results of about 40,000 routine and special air samples, the licensee conducts an extensive in-plant air sampling program. The air samplers, located throughout the plant, frequently reveal slight airborne radioactivity. This occurs less frequently in the laboratory areas in which Individuals A, B, and C worked than in some other portions of the plant.

With the exception of the July 31, 1974 occurrence, these records contain no evidence that significant airborne radioactivity occurred in the laboratory during the period reviewed.

"Air Sample Work Sheets" contain special calculations of airborne concentrations. Air sample data are used to determine MPC-hours of acutal or potential exposure. These records contain no evidence of airborne concentrations that could have caused significant exposure.

"Plutonium Special Air Test Report" forms document the taking of special air samples. The forms do not contain the air sample results, which are recorded on the "Air Sample Data Sheets," but do contain information regarding the need for the special air sample. These records show no conditions that might have caused significant exposure.

Health Physics monthly reports for the months July through November, 1974 contain no evidence of conditions that might have caused significant exposure.

Other records, including the "Contaminated Personnel or Personal Effects Report" and the "Shift Log" show evidence of minor contamination problems, but show no evidence of significant exposure.

Sewer System Survey

On November 14, samples for analysis by Kerr-McGee Technical Center and the AEC Health Services Laboratory were obtained from the Edmond, Oklahoma sewer system and sewage treatment plant by an RO:III representative, a Kerr-McGee representative, and a representative of the Edmond Sewer Department.

The sewer system serving the area of Edmond in which the apartment is located flows entirely by gravity to the treatment plant. The extended aeration Coffee Creek Plant, which opened during July 1974, accepts sewage from two independent systems having a total flow of about 1.8×10^6 gallons per day. The sewer network for the area in which the apartment is located accounts for about 6×10^5 gallons per day. Processing time is about two hours. Plant effluent, consisting of a clarified liquid, discharges into Coffee Creek. Solids generated at the plant are released to a settling pond at specified intervals. No solid material leaves the plant.

The following samples were taken: (1) sewer line approximately 400 feet downstream of the apartment (first access point); (2) lift station at the treatment plant; (3) settling pond at the treatment plant; (4) final clarification pond at the treatment plant; and (5) Coffee Creek approximately one quarter mile downstream of the plant discharge point.

Samples (3) and (5) were about half liquid and half solid. Samples (1) and (2) contained small amounts of suspended solids. Sample (4) was clear liquid.

In addition to the above samples, liquid samples were obtained on November 12 from the apartment bathroom sink trap and kitchen sink trap. The samples were taken by Kerr-McGee employees with a RO:III representative present. Also on November 8, the liquid in the toilet bowl was collected by Kerr-McGee employees. On November 14, an RO:III representative obtained a sample of this liquid.

Analysis of the samples by the AEC Health Services Laboratory yielded the following results:

	d/m/ml(1)	
Sample	239 - 240 Pu	238 Pu
Sewer line	$3.9 \pm 0.3 \times 10^{-3}$	$3 \pm 1 \times 10^{-4}$
Lift Station	$2.4 \pm 0.3 \times 10^{-3}$	$5 \pm 2 \times 10^{-4}$
Settling Pond	$1.0 \pm 0.3 \times 10^{-3}$	$5.7 \pm 3 \times 10^{-4}$
Clarification pond	$9 \pm 2 \times 10^{-4}$	$2 \pm 2 \times 10^{-4}$
Coffee Creek	$3.9 \pm 0.7 \times 10^{-3}$	$8 \pm 3 \times 10^{-4}$
Bathroom sink trap	16.6 ± 0.9	2.02 ± 0.12
Kitchen sink trap	$6.8 \pm 0.18 \times 10^{-2}$	$7.6 \pm 0.4 \times 10^{-3}$
Toilet Bowl	$4.3 \pm 0.2 \times 10^{-1}$	$5.5 \pm 0.2 \times 10^{-2}$

(1) Total activity per sample. All solids put into solution.

The above data provide no evidence that significant amounts of radioactivity was released via or is present in the public sewer system.

Kerr-McGee Employee Lockers

A survey by Kerr-McGee health physics personnel on November 7, 1974, of the locker assigned to Individual A revealed no contamination. A survey of 106

employee lockers made by Kerr-McGee on November 14, 1974, revealed no contamination except 2000 d/m in a locker assigned to an employee not involved in the occurrence under investigation. The contamination was removed.

Apartment Surveys and Decontamination

Shortly after noon on November 7, 1974, Kerr-McGee Health Physics representatives made a survey of Apartment No. 2 at 908 North Washington, Edmond, Oklahoma. Later on the same day, more comprehensive survey and decontamination efforts were begun by Kerr-McGee. These efforts continued through December 2 and required a crew of 2 to 7 employees.

Surveys in the vicinity of the apartment showed no radioactivity outside the apartment. Included in the surveys were an adjacent laundry and the trash container used by the apartment complex. The highest levels of contamination were found in the bathroom and the kitchen. Only minor levels of contamination were found in other rooms.

The following major contamination levels were found:

	Location	(dpm)
Bathroom	Toilet Seat	100,000
	Sink	1,000 to 2,000
	Tub (2 spots)	2,000
	Mat	40,000
	Floor	20,000
Kitchen	Cabinet Top	20,000
	Inside Refrigerator	3,000
	Floor (max.)	20,000
	Counter Top	1,000
	Stove Sides	25,000
	Chicken Package	6,000
	Cheese Package*	600
	Cheese	1,500 - 2,500
	Bologna Package*	800 to 38,000
	Bologna	400 to 2,500
Bedroom Individual A	Pillow Cases	500 - 1,000
	Bed Sheets	500 - 2,000
Vacuum Cleaners	Canister Type	Nothing Detectable
	Small Cleaner	40 - 50
Ductwork	Filter	1,000
	Duct Wipes	8 - 10

* When initially surveyed while in the refrigerator, a wrapper containing both the bologna and cheese packages was found to be contaminated to about 400,000 dpm. The lower levels were measured after removal from the apartment.

Air samples were taken throughout decontamination activities. The air concentration on November 7, 1974, was 2.4×10^{-12} microcuries per milliliter. Full face respirators were worn on that date. Air concentrations on later dates were less than 4×10^{-13} microcuries per milliliter.

Contamination was removed by repeated scrubbing where possible. Items considered not decontaminable or difficult to survey were removed by Kerr-McGee for treatment as contaminated waste. Furniture removed included the sofa, tables, television set, bedding, refrigerator, and range. Carpeting was removed, as were a few tiles from the bathroom. About twelve fifty-five gallon drums of smaller articles were removed. These materials were taken to the Cimarron Facility pending final disposition.

The heating system ductwork was cleaned and filters were replaced. Each apartment has its own heating system.

Direct reading surveys and smear surveys were made continually during the entire period. Final direct reading surveys made by Kerr-McGee showed < 200 disintegrations per minute per probe area of 60 cm^2 (minimum dectectable). Of a total of about 1100 smear surveys, 140 showed positive results. The highest was 24 disintegrations per minute. Areas smeared ranged from 1,000 cm^2 to 10,000 cm^2. Details are in attached report from Kerr-McGee to the Oklahoma State Department of Health. (Appendix E)

On December 3, 1974, RO:III made radiation surveys of the apartment. All direct measurements were less than 300 disintegrations per minute per probe area (60 cm^2) (minimum detectable). Thirty-five smear samples were taken and counted at Argonne National Laboratory. Of these, only 4 showed positive results. The highest was 0.36 dpm per 100 cm^2. Sample results are in the December 10, 1974 letter from RO:III to the Oklahoma State Department of Health (Appendix F).

Resurvey of Articles Removed from The Apartment

On December 2, 1974, twelve 55-gallon drums of materials removed from the apartment were inspected and spot contamination surveys were made. Contaminated furniture was not resurveyed at this time. Several articles were obtained by Kerr-McGee to help in their investigation. Included in these were several vials. The caps of the vials were removed and the vials checked with a portable alpha survey meter; no contamination was detected. Portions of the bath mat and the toilet seat cover were retrieved by Kerr McGee to obtain radioactive material for analysis by Battelle-Northwest, a Kerr-McGee consultant. Spot survey checks made during the inspection revealed no radioactivity above that previously identified during the apartment surveys.

Handling of the drums and materials was done by Kerr-McGee Health Physics personnel, who wore protective clothing and full face respirators. A representative from Region III and a licensee consultant from Battelle-Northwest were present as observers. All other observers were Kerr-McGee personnel. A plastic tent for contamination control had previously been erected near the door in Room 123, the Fabrication Room. Observers stationed in the corridor were able to see through the door windows. Air samples taken during the operation were all less than MPC.

Exposure Evaluation

The results of bioassay analyses, lung and whole body (in vivo) counts, and analysis of tissues obtained post-mortem are being evaluated by a medical consultant to the AEC. Since all such data are not yet available, final conclusions cannot be drawn. However, the medical consultant has tentatively concluded that:

1. Individual A's body contained a small amount of plutonium, probably less than one half the maximum permissible body burden of forty nanocuries.

2. Plutonium concentrations found in urine samples submitted after 8:00 a.m. of November 7, 1974, appear to be consistent with preliminary post-mortem findings and with in vivo findings. (Appendices C and I)

3. Plutonium concentrations found in certain urine samples submitted from mid-October 1974 through 8:00 a.m. on November 7, 1974, do not appear to be consistent with preliminary post-mortem findings and with in vivo findings. (Appendix I, Nos. 22, 23, 25, and 27) These concentrations probably resulted from exogenous contamination. This conclusion is supported by the fact that plutonium-to-americium ratios in urine samples 25 and 27 is not consistent with ratios found post-mortem in body tissues.

No conclusions have been drawn concerning the source of plutonium found in fecal samples or the relationship of fecal, in vivo, and post-mortem data.

Bioassay analyses and in vivo counts have not indicated significant uptake of plutonium by either Individual B or Individual C. Since all data are not yet available, final conclusions cannot be drawn concerning the nature or extent of these exposures.

All bioassay, in vivo counting, and post-mortem sample data are being furnished to the AEC medical consultant for inclusion in his evaluation of the medical aspects of the case. When received, his report will be appended to this report as Appendix N.

Attachments:
Appendices A through M

APPENDIX A

Examination of Gloves Removed From Glove Box #3, Room 135

A survey of the gloves on glove box 3, Room 135, on November 5, 1974, showed direct readings of 5000 disintegrations per minute on the right glove and 2000 disintegrations per minute on the left glove. The gloves were replaced on swing shift, November 5. The removed gloves were placed in a bag and left in Glove Box No. 3.

On November 7, 1974, the gloves were visually inspected and were then tested, first by trapping air in each glove and then by filling with water to test for leaks. No leaks were detected.

On November 11, 1974, a Region III representative observed a repeat of the tests performed on November 7. No leaks were detected. The gloves appeared to be in very good condition.

APPENDIX B

Contamination Surveys

Individual A - At approximately 2:30 p.m. on November 8, 1974, an AEC inspector surveyed Individuals A's arms, face, neck, hair, and outer clothing for alpha contamination. None was found other than a trace (probably less than one disintegration per second) on her forearms and neck.

Surveys of Individual A's Car - On November 6, 1974, the licensee surveyed Individual A's car at her request. The survey revealed no contamination greater than the licensee's release limit of 500 disintegrations per minute. The survey was repeated on November 7. No contamination was found. At approximately 6:30 p.m. on November 8, an AEC inspector surveyed the car for alpha contamination. None was detected using a survey instrument having a sensitivity of about one disintegration persecond. A more sensitive survey made by the licensee on November 9 revealed slight removable contamination, the maximum being 0.7 disintegration per second found on some switches.

A survey by an AEC inspector of the wrecked car and contents at approximately 1:00 a.m. on November 14 revealed no contamination.

Individual C's Car and Apartment - A survey of Individual C's car and apartment by the licensee on November 7, 1974, revealed no contamination.

Individual B's Car - A survey of Individual B's car by the licensee on November 7, 1974, revealed no contamination.

Accident Site, Ambulance, etc. - A survey by AEC inspectors of the accident site, ambulance, ambulance crew, and sheets used to cover Individual A's body revealed no contamination.

APPENDIX C

In Vivo Counts At Los Alamos

Individual Counted	Date	Time of Day	Area Counted	Count Time (Min)	Nanocuries* Am	Pu	Comments
C	11/11/74	1017	Lungs	30	< MDA	< MDA	
	11/12/74	0930	Lungs	20	< MDA	< MDA	
	11/11/74	1429	Whole Body	30			Normal body activity
B	11/11/74	1104	Lung	30	< MDA	< MDA	
	11/12/74	0950	Lung	15	< MDA	< MDA	
	11/12/74	1008	Buttocks	5			No detectable activity
	11/12/74	1015	Hands	5			No detectable activity
	11/11/74	1500	Whole body	30			Normal body activity
A	11/11/74	1140	Lung	30	0.35±0.07	< MDA	
	11/12/74	1025	Lung	30	0.33±0.06	< MDA	
	11/12/74	1134	Left Chest	30	0.15±0.03	< MDA	
	11/12/74	1056	Right Chest	30	0.16±0.03	< MDA	
	11/12/74	1235	Left Abdomen	20			No detectable activity
	11/12/74	1212	Right Abdomen	30			No detectable activity
	11/12/74	1256	Pubic Area	5			No detectable activity
	11/11/74	1536	Whole body	30			Normal body activity

*Minimum Detectable Activity (MDA) for americium and plutonium were about 0.3 and 8 nanocuries, respectively.

APPENDIX D

In Vivo Counting By Helgeson Nuclear Services, Inc.

Individual Counted	Date	Nanocuries* Am	Pu
A	8/1/74	<0.05	<8
B	8/5/74	<0.06	<11
C	2/24/72	0.15	<6
	1/29/74	<0.06	<7

*"Less than" values are based on a 50% confidance level.

KERR-McGEE [illegible]
P.O. [illegible] • [illegible], OKLAHOMA [illegible]

December 4, 1974

Mr. Dale McHard
Occupational and Radiological Health Service
Oklahoma State Department of Health
N. E. 10th and Stonewall
Oklahoma City, Oklahoma 73105

Dear Mr. McHard:

This letter is notice that the apartment dwelling #2 located at 908 N. Washington, in Edmond, Oklahoma, has been cleansed free of plutonium contamination to the extent that only background levels of radioactivity are now detected.

Very truly yours,

Gerald J. Sinke, Coordinator
Radiation Health and Safety

GJS:mb

KERR-McGEE CORPORATION
INTERNAL CORRESPONDENCE

TO Morgan Moore DATE December 3, 1974

FROM A. W. Norwood SUBJECT Release of Edmond Apartment

This correspondence is notice that the apartment dwelling #2 located at 908 N. Washington, in Edmond, Oklahoma has been cleansed free of plutonium contamination to the extent that only background levels of radioactivity are now detected.

Listed below is documentation of the instrumentation used to make the release surveys:

1. The equipment used to obtain the smear survey data in this report consists of a five inch NAI crystal coated with zinc sulfide for alpha scintillation detection. The detector is powered by a Ludlum 2500 power supply. The equipment was calibrated daily with a Pu 239 (660 d/m) standard source. The equipment operates with a counting efficiency of 25% and with an average background of 0.2 d/m.

2. The direct reading surveys were made with an Eberline PRM-6 portable alpha survey instrument. This instrument has the ability to make positive detection of 200 d/m per 60 cm^2 above background.

Smears of the apartment were taken with 4.25 cm Whatman #1 filter paper. The areas smeared varied from 1,000 cm^2 to 1 sq. meter. Listed below is a summary of the smear results obtained:

Date	Location	Number of 0 d/m Smears	Level of Smears Above 0 d/m	Number of Smears Above 0 d/m	Total Smears
Nov. 20	Bathroom	9	4-8 d/m	1	10
	Front Bedroom	75	0 d/m	0	75
	Back Bedroom	75	0 d/m	0	75
Nov. 21	Bathroom	69	4-8 d/m	6	75
	Hall	34	4-8 d/m	2	36
Nov. 22	Bathroom	4	4-8 d/m	3	7
	Kitchen	99	4-24d/m	1	100
	Dining Room and Kitchen Closets	50	0 d/m	0	50

NUCLEAR DIVISION

Morgan Moore
December 3, 1974
Page 2

Date	Location	Number of 0 d/m Smears	Level of Smears Above 0 d/m	Number of Smears Above 0 d/m	Total Smear
Nov. 29	Dining Room	27	4-8 d/m	4	31
	Kitchen	27	4-12d/m	13	40
	Living Room	47	4 d/m	3	50
	Bathroom	40	4-12d/m	10	50
	Hall	17	4-8 d/m	3	20
	Front Bedroom	44	4-8 d/m	6	50
	Back Bedroom	46	4-12d/m	4	50
Dec. 2	Dining Room	42	4-8 d/m	8	50
	Kitchen	36	4-8 d/m	14	50
	Living Room	67	4-8 d/m	8	75
	Bathroom	41	4-12d/m	9	50
	Hall	21	4-8 d/m	4	25
	Front Bedroom	38	4-8 d/m	12	50
	Back Bedroom	41	4-12d/m	9	50
	Ventilation System	9	8 d/m	1	10
Dec. 3	All Areas	31	4-16d/m	19	50

On December 3, 1974, the apartment was turned over to representatives of AEC and the State Health Department for their inspection and approval. Direct readings show no detectable contamination in the apartment.
The smears taken by AEC will be sent to Argonne National Lab. for analysis and there will be some time delay before the results are received.

On December 4, 1974, smears with detectable levels that were taken on December 3 were recounted for ten(10) minutes. Smears which had shown 12 to 16 d/m on December 3 showed only 0.9 to 1.2 d on December 4. The natural Radon-Thoron daughter activity had decayed off leaving only 0.9 to 1.2 d/m on the smears.

A. W. Norwood

A. W. Norwood

AWN/rmj

UNITED STATES
ATOMIC ENERGY COMMISSION
DIRECTORATE OF REGULATORY OPERATIONS
REGION III
799 ROOSEVELT ROAD
GLEN ELLYN, ILLINOIS 60137

December 10, 1974

Mr. Dale J. McHard, Director
Occupational & Radiological Health
Division
State of Oklahoma
Department of Health
3400 North Eastern Avenue
Oklahoma City, Oklahoma 73105

Dear Mr. McHard:

On December 3, 1974, a representative of this office made radiation surveys of Apartment No. 2, 908 N. Washington Street, Edmond, Oklahoma, concurrently with surveys performed by a representative of your office.

Our direct radiation measurements were made with an Eberline Model PAC-3G alpha survey meter, Serial No. 931. The meter was calibrated with a plutonium calibration source, Serial No. P5733, provided by the Oklahoma State Health Department. All direct measurements were less than 300 dpm per probe area (60 cm^2).

Smear samples for removable contamination were made over areas of 1000 square centimeters. The samples were counted at Argonne National Laboratory. Only four samples were higher than the minimum detectable of 0.05 dpm per 100 cm^2. The highest was 0.36 dpm per 100 cm^2. Results are attached to this letter.

The results of this survey show that contamination levels within the apartment are below the levels specified in the attached AEC Guidelines for Decontamination of Facilities and Equipment Prior To Release for Unrestricted Use or Termination of Licenses for Byproduct, Source, or Special Nuclear Material.

Sincerely yours,

James G. Keppler
Regional Director

Attachments:
As stated

APARTMENT SWEARS
TAKEN
DECEMBER 3, 1974

No.	Room	Location	dpm per 100 sq. c
1	Kitchen	Floor Near Refrigerator	*
2	Kitchen	Floor Near Refrigerator	*
3	Kitchen	Wall Near Refrigerator	*
4	Kitchen	Floor Near Range	0.17
5	Kitchen	Wall By Range	*
6	Kitchen	Sink	*
7	Kitchen	Sink Counter	*
8	Kitchen	Floor Near Sink	*
9	Kitchen	Cabinet Shelf	*
10	Kitchen	Dishwasher	*
11	Bathroom	Top of Toilet	*
12	Hall	Inside Door Bell Cover	*
13	Bathroom	Base of Toilet	*
14	Bathroom	Tub	0.36
15	Bathroom	Sink and Counter	*
16	Bathroom	Floor by Toilet	*
17	South Bedroom	Top of Dresser	*
18	South Bedroom	Doorknobs	*
19	South Bedroom	Floor Near Door	*
20	South Bedroom	Window Sill	*
21	South Bedroom	Wall	*
22	South Bedroom	Wall	*
23	South Bedroom	Closet	0.34
24	Front Porch		*
25	Back Porch		*
26	Living Room	Ceiling Near Air Return	*
27	Living Room	Window Sill	0.06
28	Living Room	Wall	*
29	Living Room	Wall	*
30	Hall	Wall	*
31	North Bedroom	Wall	*
32	North Bedroom	Knobs	*
33	Dining Room	Cabinet	*
34	Dining Room	Floor	*
35	Dining Room	Cabinet Shelf	*

* Less than 0.03 dpm per 100 cm^2.

GUIDELINES FOR DECONTAMINATION OF FACILITIES AND EQUIPMENT PRIOR TO RELEASE FOR UNRESTRICTED USE OR TERMINATION OF LICENSES FOR BYPRODUCT, SOURCE, OR SPECIAL NUCLEAR MATERIAL

U. S. Atomic Energy Commission
Directorate of Licensing
Materials Branch
Washington, D.C. 20545

December, 1973

The instructions in this guide in conjunction with Tables I and II specify the radioactivity and radiation exposure rate limits which should be used in accomplishing the decontamination and survey of surfaces of premises and equipment prior to abandonment or release for unrestricted use. The limits in Tables I and II do not apply to premises, equipment, or scrap containing induced radioactivity for which the radiological considerations pertinent to their use may be different. The release of such facilities or items from regulatory control will be considered on a case-by-case basis.

1. The licensee shall make a reasonable effort to eliminate residual contamination.

2. Radioactivity on equipment or surfaces shall not be covered by paint, plating, or other covering material unless contamination levels, as determined by a survey and documented, are below the limits specified in Tables I or II prior to applying the covering. A reasonable effort must be made to minimize the contamination prior to use of any covering.

3. The radioactivity on the interior surfaces of pipes, drain lines, or ductwork shall be determined by making measurements at all traps, and other appropriate access points, provided that contamination at these locations is likely to be representative of contamination on the interior of the pipes, drain lines, or ductwork. Surfaces of premises, equipment, or scrap which are likely to be contaminated but are of such size, construction, or location as to make the surface inaccessible for purposes of measurement shall be presumed to be contaminated in excess of the limits.

4. Upon request, the Commission may authorize a licensee to relinquish possession or control of premises, equipment, or scrap having surfaces contaminated with materials in excess of the limits specified. This may include, but would not be limited to, special circumstances such as razing of buildings, transfer of premises to another organization continuing work with radioactive materials, or conversion of facilities to a long-term storage or standby status. Such requests must:

   a. Provide detailed, specific information describing the premises, equipment or scrap, radioactive contaminants, and the nature, extent, and degree of residual surface contamination.

   b. Provide a detailed health and safety analysis which reflects that the residual amounts of materials on surface areas, together with other considerations such as prospective use of the premises, equipment or scrap, are unlikely to result in an unreasonable risk to the health and safety of the public.

5. Prior to release of premises for unrestricted use, the licensee shall make a comprehensive radiation survey which establishes that contamination is within the limits specified in Tables I or II. A copy of the survey report shall be filed with the Director, Materials Branch, Directorate of Licensing, USAEC, Washington, D.C. 20545, and also the Director of the Regional Office of the Directorate of Regulatory Operations, USAEC, having jurisdiction. The report should be filed at least 30 days prior to the planned date of abandonment. The survey report shall:

   a. Identify the premises.

   b. Show that reasonable effort has been made to eliminate residual contamination.

   c. Describe the scope of the survey and general procedures followed.

   d. State the findings of the survey in units specified in the instruction.

Following review of the report, the AEC will consider visiting the facilities to confirm the survey.

SURFACE CONTAMINATION LEVELS[1]

TABLE I

ISOTOPE[2]	TOTAL[3]	REMOVABLE[3][4]
U-nat, U-235, U-238, Th-nat, Th-232, and associated decay products	10,000 dpm α/100 cm²	1,000 dpm α/100 cm²
Other isotopes which decay by alpha emission or by spontaneous fission	1,000 dpm α/100 cm²	100 dpm α/100 cm²
Beta-gamma emitters (isotopes with decay modes other than alpha emission or spontaneous fission)	0.4 mrad/hr at 1 cm[5]	1,000 dpm β-γ/100 cm²

TABLE II

ISOTOPE[2]	TOTAL[3]	REMOVABLE[3][4]
U-nat, U-235, U-238, Th-nat, Th-232, and associated decay products	Average[6]: 5,000 dpm α/100 cm² Maximum: 15,000 dpm α/100 cm²	1,000 dpm α/100 cm²
Other isotopes which decay by alpha emission or by spontaneous fission	Average[6]: 300 dpm α/100 cm² Maximum: 1,500 dpm α/100 cm²	100 dpm α/100 cm²
Beta-gamma emitters (isotopes with decay modes other than alpha emission or spontaneous fission)	Average[6]: 0.2 mrad/hr at 1 cm[5] Maximum: 1.0 mrad/hr at 1 cm[5]	1,000 dpm β-γ/100 cm²

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(1) Either Table I or Table II may be used. For example, if all beta-gamma readings were less than 0.4 mrad/hr at 1 cm, Table I could be used; but if the maximum reading were 0.8 mrad/hr, material could be released under Table II provided the average was less than 0.2 mrad/hr.

(2) Where surface contamination by both alpha and beta-gamma emitting isotopes exists, the limits established for alpha and beta-gamma emitting isotopes shall apply independently.

(3) As used in this table, dpm (disintegrations per minute) means the rate of emission by radioactive material as determined by correcting the counts per minute observed by an appropriate detector and count rate meter for background, efficiency, and geometric factors associated with the instrumentation.

(4) The amount of removable radioactive material per 100 cm² of surface area shall be determined by wiping that area with dry filter or soft absorbent paper and with the application of moderate pressure, and measuring the amount of radioactive material on the wipe with an appropriate instrument of known efficiency. In determining removable contamination on objects of lesser surface area, the pertinent levels shall be reduced proportionally, and the entire surface shall be wiped.

(5) Measured through not more than 7 milligrams per square centimeter of total absorber.

(6) Measurements of total contamination shall not be averaged over more than 10 square meters. For objects of lesser surface area, the average shall be derived for each such object.

KERR-McGEE NUCLEAR CORPORATION
KERR-McGEE CENTER • OKLAHOMA CITY, OKLAHOMA 73125

October 16, 1974

Mr. Donald F. Knuth, Director
Directorate of Regulatory Operations
United States Atomic Energy Commission
Washington, D.C. 20545

Re: License #SNM-1174, Docket #70-1193

Dear Mr. Knuth:

Kerr-McGee Nuclear Corporation hereby reports that two employees were potentially exposed to airborne concentrations of insoluble plutonium 239 in excess of the applicable limits.

The potential exposure data is as follows:

Employee	Exposure Period	Average 40 Hr. Concentration
A	July 28 - Aug. 3, 1974	3.71×10^{-10} uCi/ml
B	July 28 - Aug. 3, 1974	1.59×10^{-10} uCi/ml

This possible exposure to these employees occurred during the 4:00 p.m. - midnight work shift on July 31, 1974 in room #133 of the laboratory section in the plutonium plant. Employee A worked over-time until 4:00 a.m. the next morning. She spent approximately 7 hours in the room before midnight, and nearly 4 hours after midnight.

Employee B spent 3 hours in the room before midnight. Another person (employee C) spent 10 minutes in the room and his exposure was estimated to be 8.8 MPC hours.

Employee A was working in glovebox Z, preparing samples for emission spectrography. Not once did employee A, B or employee C notice anything which could have caused an airborne problem. Self monitoring with instruments showed no contamination.

OCT 21 1974

The two air samples in the room were changed by a health physics technician shortly before midnight. These samples were later found to have high counts. (The air samples for the previous work shift were normal and the next samples, from midnight to 8:00 a.m., were also normal).

After the high samples were discovered on the 8:00 a.m. - 4:00 p.m. shift of 8/1/74, room 133 was posted as a respirator use area, and a careful survey was made for contamination. No contamination was found on box Z, on floors, walls, room exhaust filters or other equipment. A small area on top of glovebox Y had some contamination as did a flange to the vacuum systems above box Y. Decontamination was done. This contamination was not considered to be a contributor to the high air-count samples.

Employees A, B and C were placed on a daily bioassay sampling program for the next 4 days. These samples were analyzed for Pu by a procedure having a lower sensitivity of 0.5 dpm/l (for urine) and 0.5 dpm/kg (for feces). These are rapid procedures. The sample analytical results did not indicate an uptake of Pu. In addition, employee A was in-vivo lung counted later in the day on 8/1/74. The lung count results were negative for both 239 Pu and 241 Am.

The high-count air sample papers were alpha autoradiographed and the resulting photograph showed a pattern not expected for a typical air sample. The high count papers were then subjected to a solubility test and the contaminate was found to be 3.4% soluble and 96.6% insoluble.

The lack of evidence confirming exposure prompted the collectio of follow-up urine samples to be analyzed by a lengthy autoradiographic method giving a lower sensitivity of 0.1 dpm. Employee A submitted urine samples on 8/15/75 and 8/25/74. The results of these samples were received on 10/10/74. The results were 3.51 dpm/1100 ml. for the 8/15/74 sample and 4.98 dpm/700 ml. for the 8/25/74 sample.

Employee A is now on a weekly bioassay sampling program which will be sustained until enough data has been accumulated to assign a burden value or until three consecutive samples have results less than 1.0 dpm.

An initial estimate of intake for employee A from the air sample data is 2.6 nanocuries during the seven hour period in room 133; as follows:

The air concentration averaged 19,479 dpm with a volume of 27,187 liters (960 ft^3) resulting in a concentration of 0.7165 dpm/liter. A woman's light activity breathing rate is 19 liters/minute. In seven hours, 7,980 liters of air containing 5,718 dpm could have been breathed. This is equivalent to 2.6 nanocuries.

Since lung retention of insoluble particulates (50-500 day 1/2 life) is 12½% of the intake, the ultimate lung burden could hardly be more than 0.31 nanocuries. 16.0 nanocuries is the maximum permitted lung burden.

Employees B and C will be bioassay sampled further to determine if any internal deposition of plutonium is present.

Employee A is no longer working with unencapsulated plutonium materials. She now works in an area of very low exposure potential. This work restriction will remain in effect until we are certain that it is no longer necessary.

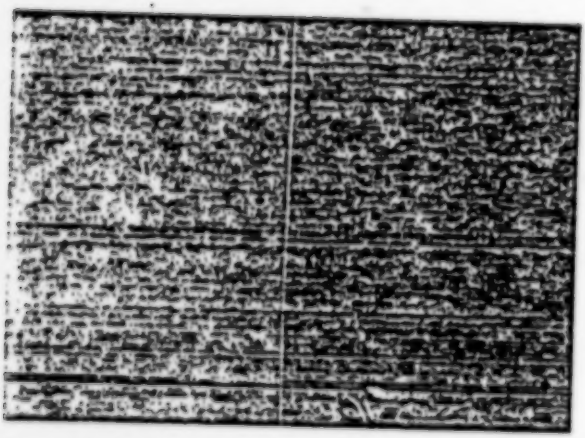
A copy of this report will be supplied to employees A and B in accordance with Part 19 regulations. In accordance with Part 20.405, the employees' identification and exposure data are listed on the enclosed appendix.

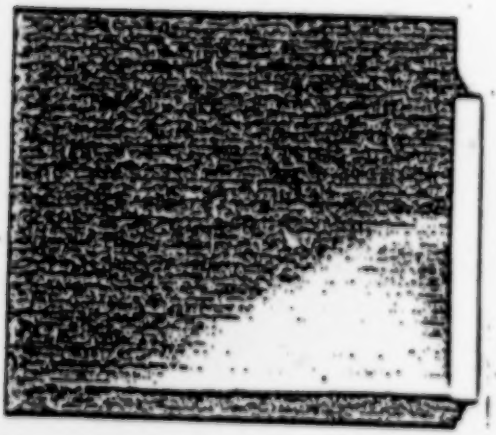
Sincerely yours,

W. J. Shelley, Director
Regulation & Control
Kerr-McGee Nuclear Corporation

WJS:ml

cc: Mr. James Keppler
Mr. Dale McHard




16

No.	Basis	Solid Vol. or Wt.	Solid Initial	Solid Subsequent	Incubated Liq.	Incubating Liq. Conc.	Liquid Subsequent	Liquid Vol. or Wt.	Liq.	Concentration	Results
1	W		8/11/72			0%	0-48			<0.1 cfu/ml	Plate Discovery
2	W		11/1/72			0%	0-48			<0.1 cfu/ml	
3	W		2/13/73			0%	0-48			3.3E+1 cfu/ml	
4	W		3/7/73			0%	0-48			<0.1 cfu/ml	
5	W		3/8/73			0%	0-48			<0.1 cfu/ml	
6	W		3/21/73			0%	0-48			<0.1 cfu/ml	
7	F		3/31/73			0%	0-48			3.3E+1 cfu/333 g fm	
8	W		4/11/73			0%	0-48			<0.1 cfu/ml	
9	F		4/11/73			0%	0-48			<0.1 cfu/ml	
10	W		10/16/73			0%	0-48			<0.1 cfu/ml	
11	W		11/5/73			0%	0-48			<0.1 cfu/ml	
12	W		2/13			0%	0-48			<0.1 cfu/ml	
13	W	[illegible] ml	2/13			0%	0-48		ml	<0.1 cfu/[illegible] ml fm	
14	F	340 g	2/1			0%	0-48		ml	3E+1 cfu/340 g fm	
15	F	294 g	2/2			0%	0-48		ml	<0.1 cfu/294 g fm	
16	W	[illegible] ml	2/5			0%	0-48		ml	4E+1 cfu/[illegible] ml fm	
17	W	[illegible] ml	2/13			0%	0-48		ml	2.2 cfu/[illegible] ml fm	

*100% volume dilution used.

Annexure I (Page 2)

Sr. No.	Date	Data						Analysis			
		Vol. of Blank	Symbol	Sub-symbol	Symbol of Pt.	Tubing Diam.	Cross Section	Vol. of Blank	Dr.	Concentration	Remarks
18	9	700 ml	9/23			Dr	2.45		1007	3.0 dis/700 ml Pu	
19	9	800 ml	9/12			Dr	2.45		1007	< 0.1 dis/700 ml Pu	
20	9	900 ml	1			Dr	2.45		1007	< 0.1 dis/700 ml Pu	
21	9	950 ml	2420			Dr	2.45		1007	< 0.1 dis/700 ml Pu	
22	9	1000 ml	Between 20/13 & 20/20	Blank	None	Dr	2.45	1000 ml	1007	0.025 dis/1000 ml Pu	Dr. 21 and 22 samples possibly reversed.
23	9	1100 ml	9/5 20/21	9/5 20/21	None	Dr	2.45	1100 ml	1007	2.200 dis/1000 ml Pu	
24	9	425 ml	9/5 20/21	11/5*	Tank	Dr	2.45	425 ml	2.45	93.1 dis/425 ml Pu	*Removed from tanker
25	9	850 ml	9/5 2425	11/5	None	Dr	2.45	850 ml 850 ml	1007 1007		
26	9	50 g	2425	20/7	None	Dr	2.45	50 g	2.45		
27	9	2000 ml	2425+20	20/7	None	Dr	2.45	2000 ml 2000 ml	2.45 1007		

Appendix 1 (Page 39)

No.	Date	Vol. or Mass	Yielded	Sub-cultured	Yielded in	Yielding Spore.	Cross Linker	Vol. or Mass	Dx	Concentration	Remarks
29	0	150 ml	11/7	11/8	Broth	Bs	0-40	150 ml	0-40	1.0 kGy/150 ml Bs	Removed from Incubator.
30	0	1055 ml	11/7-8	11/8	Slime	Bs	0-40	1055 ml	0-40	0.2 kGy/150 ml Bs 1.3 kGy/305 ml Bs 0.3 kGy/305 ml Bs 0.4 kGy/95 ml Bs	
31	0	1535 ml	11/8-9	11/9	Slime	Bs	0-40	680 ml 305 ml 150 ml	0-40 0-40 0-40	1.0 to 4.0 kGy/680 ml Bs 80-1 kGy/305 ml Bs 0.3; 0.35-3 kGy/ml 230-240 Bs 1.3 ; 0.35-3 kGy/ml 230 Bs Not analyzed for 241-Bs	230-240 Bs=230-Bs-7.3
32	0	>215 g	11/9	11/9	Soup.	Bs	0-40	>215 g 24.4 g 44.3 g 41 g 40.8 g	0-40		
		>43g	11/9	11/9	Soup.	Bs	0-40	>43 g 23.0 g 20.3 g	0-40		

Gb
Vessel Alpha
Bs 1 Alpha

Gb Self	Gb Vessel	Bs Vessel
1.333	1.333	1.333 Paper Towel
1.333	1.333	1.333 Paper Towel
1.333	1.333	1.333 Paper Towel
1.333	1.333	1.333 Paper Towel
1.333	1.333	1.333 Paper Towel
1.333	1.333	1.333 Paper Towel

"Bs" cross contamination by pseudomonas and others not existing.

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APPENDIX I (Page 4)

No.	Sample Type	Data: Vol. or Mass	Data: Received	Data: Sub-mitted	Data: Yielded Al	Data: Yielding Isotr.	Data: Co-lumns	Analysed: Vol. or Mass	Analysed: By	Concentration	Remarks
34	U	100 ml	11/10 ?	11/13	None	Th	0-6	75 ml 100 ml	NRT NRL	0.17 d/m/75 ml Pu 3.3 ± 0.42-3 d/m/ml 239-240 Pu ≥ 2E-4 d/m/ml 239-Pu See enclosure for 241 Am	
35	U	275 ml	11/11*	11/11		Th	2-6	70 ml	LASL	0.13 d/m/70 ml 239-Pu	*Some or all precipitated
36	U	260 ml	11/11*	11/11		Th	2-6	70 ml	LASL	<0.03 d/m/70 ml 239-Pu	voided on 11/10.
37	U	325 ml	11/11*	11/11		Th	2-6	70 ml	LASL	0.03 d/m/70 ml 239-Pu	
38	U	130 ml	11/11*	11/11		Th	2-6	70 ml	LASL	0.04 d/m/70 ml 239-Pu	
39	U	890 ml	11/11	11/14		Th	LASL	70 ml	LASL	<0.03 d/m/70 ml 239-Pu	
28	U	425 ml	11/11	11/11		Th	LASL	70 ml	LASL	0.01 d/m/70 ml 239-Pu	
30	U	285 ml	11/12	11/13		Th	LASL	70 ml	LASL	<0.03 d/m/70 ml 239 Pu	
40	U	230 ml	11/12	11/13		Th	LASL	70 ml	LASL	<0.03 d/m/70 ml 239-Pu	
41	U	130 ml	11/12	11/13		Th	LASL	70 ml	LASL	0.02 d/m/70 ml 239-Pu	
42	U	422 ml	11/12	11/13		Th	LASL	70 ml	LASL	<0.03 d/m/70 ml 239-Pu	
43	F	70 g	11/11	11/11	LASL	Th	LASL	70 g	LASL	2.022 d/m/70 g Gamma Alpha 2.023 d/m/70 g 239-Pu 239-Pu+239-Pu = 3.9 6.005 d/m/70 g 239-Pu 239-Pu+241-Am = 17. 2.359 d/m/70 g 241 Am	
44	F	30 g	11/11	11/12	None	Th	LASL	30 g	LASL	3.020 d/m/30 g Gamma Alpha 6.005 d/m/30 g 239-Pu 239-Pu+239-Pu = 0.3 3.021 d/m/30 g 239-Pu 239-Pu+241-Am = 14 5.359 d/m/30 g 241-Am	

No.	Sample Type	Date Vol or Mass	Dated	Sub-planted	Method of Ag	Washing Meth.	Con-tainer	Date Vol. or Mass	By	Comments	Results
45	F	303 g	11/11	11/13	Sieve	No	Lab.	303 g	Lab.	1.30E dis/303 g Gross Alpha 1.60E dis/303 g 110-Pu 210-Pu/239-Pu = 1.7 1.02E dis/303 g 210-Pu 239-Pu/241-Am = 36 7.90E dis/303 g 241-Am	
46	F	303 g	11/11	11/13	Lab.	No	Lab.	303 g	Lab.	1.30E dis/303 g Gross Alpha 6.02E dis/303 g 110-Pu 210-Pu/239-Pu = 0.3 7.30E dis/303 g 210-Pu 239-Pu/241-Am = 31 1.02E dis/303 g 241-Am	
47	S	200 ml	11/11	11/13	Sieve	No	0-10	200 ml 100 ml	Lab. Lab.	<0.1 dis/200 ml Pu 1.0 ± 0.3E-4 dis/ml 210-240 Pu 2.3 ± 0.3E-4 dis/ml 210-Pu Not analyzed for 241-Am	
48	F	30.0 g	11/11 or 13	11/13	Sieve	No	0-10	30.0 g	Lab.	3.10E dis/30.0 g Pu	
49	S	440 ml	11/11 & 13	11/13	Sieve	No	0-10	200 ml 100 ml 100 ml	Lab. Lab. Lab.	<0.1 dis/200 ml Pu Composite Analysis 1±0.1E-4 dis/ml 210-240 Pu 1.5±0.1E-4 dis/ml 210-Pu Not analyzed for 241-Am 1±0.1E-4 dis/ml 210-240 Pu 1.5±0.1E-4 dis/ml 210-Pu Not analyzed for 241-Am	
50	S	1100 ml	11/11	11/13	0-10	Sieve	0-10	200 ml 200 ml 140 ml 200 ml	Lab. Lab. Lab. Lab.	<0.1 dis/200 ml Pu Composite Analysis 1±0.1E-4 dis/ml 210-240 Pu 1.5±0.1E-4 dis/ml 210-Pu Not analyzed for 241-Am 8±0.1E-4 dis/ml 210-240 Pu 2.3±0.3E-3 dis/ml 210-Pu Not analyzed for 241-Am 1±0.1E-4 dis/ml 210-240 Pu 1.5±0.1E-4 dis/ml 210-Pu Not analyzed for 241-Am	
51	F	30 g	Duplicate						Lab.	4.20E dis/30.0 g Pu	

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SAMPLES	Data						Analyzed			
	Vol. or Mass	Voided	Submitted	Voided At	Voiding Descr.	Container	Vol. or Mass	By	Concentration	Remarks
9	1000 ml	1/1		Home	No	S-H	1000 ml	UUT	<0.1 d/m/1000 ml Pu	First Discovery
9	1000 ml	6/30		Home	No	S-H	1000 ml	UUT	<0.1 d/m/1000 ml Pu	
9	300 ml	11/8		Home	No	S-H	300 ml	S-H	1.0 d/m/300 ml Pu	
9	850 ml	11/9		Home	No	S-H	850 ml	S-H	5.0 d/m/850 ml Pu	
9	235 ml	11/11[AM]	11/11	Home	No	S-H	70 ml	LASL	<0.03 d/m/70 ml Pu-239	
9	250 ml	11/11[AM]	11/11	Home	No	S-H	70 ml	LASL	0.04 d/m/70 ml Pu-239	
9	445 ml	11/11[PM]	11/11	Home	No	S-H	70 ml	LASL	0.05 d/m/70 ml Pu-239	
9	380 ml	11/11[AM]	11/11	Home	No	S-H	70 ml	LASL	<0.03 d/m/70 ml Pu-239	
9	365 ml	11/12	11/12	LASL	No	LASL	70 ml	LASL	0.04 d/m/70 ml Pu-239	
F	72 g	11/11	11/11	LASL	No	LASL	72 g	LASL	2.383 d/m/72 g Gross Alpha 2.383 d/m/72 g Pu-239 Pu-239:Pu-238 = 6 : 1.682 d/m/72 g Pu-238 Pu-238:Am-241 = 1.882 d/m/72 g Am-241	
F	33.8 g	11/12	11/13?	Home	No	S-H	33.8 g	UUT	<3 d/m/33.8 g Pu	
9	1980 ml	11/12	11/13?	Home	No	S-H	1980 ml	UUT	<0.1 d/m/1980 ml Pu	
9	325 ml	11/12	11/12	Home	No	S-H	325 ml	UUT	0.0[illegible]-5 d/m/ml Pu-239/240 0.0[illegible]-0 d/m/ml Pu-238	
9		11/13			No	S-H		UUT	<0.1 d/m/700 ml Pu	
9	400 ml	11/14			No	S-H	400 ml	UUT	<0.3 d/m/400 ml Pu	

11 2000
Possibly voided on 11/10

Sample	Data						Analysis			
	Vol. or Mass	Yielded	Sub-mitted	Yielded At	Yielding Surv.	Container	Vol. or Mass	By	Concentration	Remarks
6		11/15			No	S-M		WHT		
6	1675 ml	11/16			No	S-M	675 ml 800 ml	S-M WHT	0.6 d/m/675 ml Pu $<$0.5 d/m/800 ml Pu	
7	43.7 g	11/17			No	S-M	43.7 g	WHT	3.3$\pm$1 d/m/43.7 g Pu	
8	1200 ml	11/17			No	S-M	1200 ml	WHT	$<$0.5 d/m/1200 ml Pu	
10	325 ml	11/18	11/21		No	S-M	600 ml 325 ml	WHT HAL	$<$0.5 d/m/600 ml Pu 3$\pm$3E-5 d/m/ml Pu-238/240 2$\pm$3E-5 d/m/ml Pu-238	
9	1390 ml	11/19	11/21		No	S-M	650 ml 840 ml	WHT HAL	$<$0.5 d/m/650 ml Pu 4$\pm$2E-5 d/m/ml Pu-238/240 3$\pm$1E-5 d/m/ml Pu-238	
9	580 ml	11/20	11/21		No	S-M	300 ml 480 ml	WHT HAL	$<$0.5 d/m/300 ml Pu 5$\pm$2E-5 d/m/ml Pu-238/240 2$\pm$1E-5 d/m/ml Pu-238	
7	41 g	11/18, 19, 20, or 21	11/21		No	S-M	41 g	HAL	1.3$\pm$0.3E-3 d/m/g Pu-238/240 1.5$\pm$0.3E-3 d/m/g Pu-238 9$\pm$1E-3 d/m/g Am-241	Pu-239/240: Pu-238-0.9$\pm$0.7 Pu-239/240: Am-241-15$\pm$1
6		11/26						WHT		
9		11/27						WHT		
9		11/28						WHT		
8		11/29						WHT		Final "daily" sample placed on "weekly" collection schedule

URINE AND FECAL ANALYSIS - INDIVIDUAL C

SAMPLE	Date* Vol. or Mass	Voided	Submitted	Analyzed Voided At	Voiding Hours	Container	Vol. or Mass	By	Concentration	Remarks
U	1100 ml	4/10/70							<0.1 d/m/1100 ml Pu	First Discovery
U	1200 ml	9/4/70							<0.1 d/m/1200 ml Pu	
U	700 ml	11/6/70							<0.1 d/m/700 ml Pu	
U	1100 ml	5/15/71							0.2 d/m/1100 ml Pu	
U	700 ml	6/22/71							<0.1 d/m/700 ml Pu	
U	1375 ml	9/20/71							<0.1 d/m/1375 ml Pu	
U	1300 ml	1/19/72							<0.1 d/m/1300 ml Pu	
U	1500 ml	4/25/72							<0.1 d/m/1500 ml Pu	
U	1500 ml	7/31/72							<0.1 d/m/1500 ml Pu	
U										Sample lost.
U	1300 ml	2/7/73							<0.1 d/m/1300 ml Pu	
U	1300 ml	6/20/73							<0.1 d/m/1300 ml Pu	
U	1500 ml	10/1/73							<0.1 d/m/1500 ml Pu	
U	1300 ml	11/20/73							<0.1 d/m/1300 ml Pu	
U	1500 ml	4/1							<0.1 d/m/1500 ml Pu	
U	1400 ml	6/19							<0.1 d/m/1400 ml Pu	
U	1500 ml	9/30							<0.1 d/m/1500 ml Pu	Final Discovery while [illegible] employed.

SAMPLE	Data						Analysed			
	Vol. or Mass	Voided	Sub-mitted	Voided At	Voiding Surv.	Con-tainer	Vol. or Mass	By	Concentration	Remarks
F	71 g	11/11	11/12	Home	No	LASL	71 g	LASL	<3.882 d/m/71 g Cesco Pu-239:Pu-238=6.7 Alpha 3.481 d/m/71 g Pu-239 0 d/m/71 g Pu-238 6 d/m/71 g Am-241	
U	140 ml	11/11*	11/11	Home	No	E-H	70 ml	LASL	<0.83 d/m/70 ml Pu-239	
U	350 ml	11/11*	11/11	Home	No	E-H	70 ml	LASL	<0.83 d/m/70 ml Pu-239	
U	141 ml	11/11*	11/11	Home	No	E-H	70 ml	LASL	<0.83 d/m/70 ml Pu-239	
U	310 ml	11/11*	11/11	Home	No	E-H	70 ml	LASL	<0.83 d/m/70 ml Pu-239	
U	325 ml	11/12	11/12	LASL	No	LASL	70 ml	LASL	<0.83 d/m/70 ml Pu-239	
U	185 ml	11/12	11/12	LASL	No	LASL	70 ml	LASL	<0.83 d/m/70 ml Pu-239	
U	190 ml	11/12	11/12	LASL	No	LASL	70 ml	LASL	<0.83 d/m/70 ml Pu-239	
U	335 ml	11/13	11/22	Home	No	E-H	335 ml	BNL	140.68-4 d/m/ml Pu-239/240 1.490.60-4 d/m/ml Pu-238	
F	109 g	11/13	11/22	Home	No	E-H	109 g	BNL	1.323 d/m/109 g Pu	
F	78.5 g	11/14	11/22	Home	No	E-H	78.5 g	BNL	1.1 d/m/78.5 g Pu	Final Disposal

*ossibly voided on 11/10.

APPENDIX L
ISOTOPIC RATIOS

Sample	Ref.*	Individual	Laboratory	Ratios Pu-239** / Pu-238	Ratios Pu-239** / Am-241	Remarks
Urine	I-25	A	HSL	7.9	6.0	
Urine	I-27	A	HSL	8.1 8.2	5.6 5.7	Second aliq analyzed.
Fecal	I-43	A	LASL	7.9	17	
Fecal	I-44	A	LASL	8.3	14	
Fecal	I-45	A	LASL	7.7	26	
Fecal	I-46	A	LASL	8.2	21	
Fecal	J-10	B	LASL	6.1	18	
Fecal	J-23	B	HSL	8.9	15	
Fecal	K-18	C	LASL	6.7	9	
Nose		-	HSL	7.6	16	
Kitchen Sink Trap		-	HSL	9.0	12	
Bathroom Sink Trap		-	HSL	8.2	18	
Toilet Bowl		-	HSL	7.8	23	
Glove Box Smear		-	HSL	8.3	11	
Nasal Smear (11/7)		A	LASL	8.1	16	

*Appendix - Sample Number
**Reported as Pu - 239/240 by HSL

APPENDIX H

Health Physics Records Reviewed During Investigation

"Air Sample Data Sheet"	1,866 pages
"Air Sample Work Sheet"	72 pages
"Plutonium Special Air Test Report"	994 pages
Health Physics Monthly Reports	59 pages
"Contamination Incident Report"	19 pages
"Contaminated Personnel or Personal Effects Report"	82 pages
"Special Radiation Survey Report"	2 pages
Bioassay Records	33 pages
"Shift Log"	529 pages
Miscellaneous	25 pages

RO INVESTIGATION REPORT NO. 74-09

DIRECTORATE OF REGULATORY OPERATIONS

REGION III

SUMMARY REPORT OF EVALUATION OF BIOMEDICAL ASPECTS OF THE KERR-McGEE PERSONNEL CONTAMINATION INCIDENT REPORTED NOVEMBER 7, 1974

Appendix N

Summary Report

To: Mr. James Allen
U.S. Nuclear Regulatory Commission
Region III

From: Hiel Wald, M.D., Medical Consultant

Date: 6 February 1975

Subject: Summary Report of Evaluation of Biomedical Aspects of the Kerr-McGee Personnel Contamination Incident Reported November 7, 1974

This is a report of the investigation of the biomedical aspects of an exposure incident at the Kerr-McGee plutonium facility in Cimarron, Oklahoma which was carried out in accordance with your telephone instructions of 10:30 AM, 8 November 1974. Individual A was the employee directly involved, but evaluations were also made for Individual B, her roommate, who was also a Kerr-McGee employee, and Individual C, a friend and former employee of the facility.

Pertinent Details of the Incident:

R.O. Investigation Report No. 74-09 provides a summary of the facts in this incident.

Medical Consultant Investigation:

In view of the unusual contamination history of the preceding several days, beginning on 5 November 74; the preliminary gross bioassay results which suggested a possible intake of 100 microcuries or more of mobile plutonium-239; and Individual A's reported unwillingness to return to work, collect excreta, or accept DTPA therapy without some guidance regarding her health status, arrangements were made to travel to Oklahoma City on 8 November 1974. Attempts to talk with the company medical consultant via telephone prior to departure in mid-afternoon were not successful. On arrival in Oklahoma City at 10:30 PM discussions were held with the AEC Regulatory Operations (R.O.) investigating team concerning the current status of their work. An interview was arranged with Individual A at 9:00 AM the next morning. At midnight the company medical consultant was reached by telephone. He had not yet seen the individual involved in the incident and was planning to arrive in Oklahoma City from Albuquerque at about 11:30 AM on 9 November. He gave approval to the planned meeting with Individual A, agreed to meet with me following his arrival, and asked me to inform Individual A that he would be available to her thereafter.

At 9:30 AM on 9 November Individual A was interviewed. At her request the legislative assistant to the Oil, Chemical and Atomic Workers Union, and Individual C, who accompanied her, remained in the room as did a member of the R.O. team who accompanied me. Individual A appeared tense and anxious, frequently seeking support and reassurance from Individual C and the Union staff member.

Pertinent historical information included a history of bronchial pneumonia and asthma from about 6 months to 15 years of age while living in Corpus Christi area of Texas. Treatment with gamma globulin seemed to be helpful. Then the asthma gradually disappeared but milder episodes of hay fever persisted. An old left nasal fracture resulted in unilateral chronically impaired breathing.

More recently, about October 1973, Individual A had a lung infection for which diagnostic chest x-rays were performed. She recovered by summer. About October 1974 a lung infection recurred lasting about 2 to 4 weeks, with diagnostic chest x-rays performed about 2 weeks ago. She was under the treatment of a physician in Oklahoma City. An additional observation was of hypertension for which he had given her some relaxant medication. This was discontinued on November 5th because of some side effects interfering with her work. She showed me a container with several types of capsules and pills including one she identified as Tylenol no. 3 (an analgesic containing acetaminophen, 300 mg. and codeine phosphate, 30 mg.). She was a cigarette smoker, using about a pack a day.

Individual A appeared intelligent and had completed 2 years of college training aimed at medical technology when she stopped for marriage and 3 children. Following dissolution of the marriage she moved to Oklahoma City about 3 years ago and began working at Kerr-McGee as a technician.

Individual A stated that she was concerned by the plutonium contamination findings and the repeated decontamination procedures which began on 5 November. She also felt that the company's response to the incident by having legal counsel take a deposition from her more promptly than they provided what she considered knowledgeable medical counsel was not helpful. By the morning of November 8th, therefore, she decided not to report to work until she had received such knowledgeable guidance concerning her health status. She was informed of the company medical consultant's expected arrival and agreed to meet with him in the early afternoon.

Discussions were then held with the Kerr-McGee medical consultant and their Coordinator of Radiation Health and Safety in the course of which arrangements were confirmed for whole body and chest counting as well as additional bioassay sampling to be carried out at Los Alamos Scientific Laboratory for Individuals A and C. Individual B was then interviewed by the Kerr-McGee medical consultant and me. In view of her concerns about the contamination of the apartment she shared with Individual A it was decided to included her in the in-vivo counting arrangement. Individuals A and C then returned along with several members of the Oil, Chemical and

Atomic Workers Union. Following general discussion aimed at clarifying the health issues involved and the appropriate diagnostic procedures, the Kerr-McGee medical consultant arranged for appropriate clinical laboratory and x-ray examinations at a local hospital that afternoon. It was also planned by him to administer one dose of DTPA to Individual A at that time. He had indicated that this was to have been given on November 8th at a clinic near the plant but Individual A had not reported for work that day.

Following departure of Individuals A, B and C and their associates, discussion was held with the Kerr-McGee medical consultant concerning the Kerr-McGee program for responding to personnel exposure incidents. He had indicated to the company that the relative isolation of the plant and the nature of the work there justified an in-vivo counting facility in the vicinity to provide quick resolution of problems like this one. However, he noted that it took many years even to develop the capability to do bioassay analyses at a nearby research center of the company. Regarding medical care, he indicated that the physician who operates a clinic in the plant's vicinity served adequately as a source of primary medical care, supported by the consultant's availability to provide technical aid when needed. The local physician was to have taken the AEC-sponsored short course in Medical Management of Radiation Accidents. The Kerr-McGee medical consultant was unable to explain why the local physician was not involved in our discussions with Individuals A, B and C or with each other. He indicated that his delay in seeing Individual A was due to her not having reported to work on November 5th as requested.

Biomedical Evaluations:

My further participation in the biomedical investigation and evaluation of results included continuing discussions with the Kerr-McGee medical consultant; the leader of the Health Division at Los Alamos Scientific Laboratory, and associated radiochemistry personnel; and personnel of Regulatory Operations staff.

Individual A:

In this individual, the evaluation of the magnitude of exposure and of any resultant body burden involved examinations of five sets of data. These are: A., the information obtained by monitoring the home and work environment of the individual (Appendices A and B), B., the results of urine and fecal excretion bioassays (Appendix I), C., the results of the in-vivo internal radioactivity measurements (Appendices C and D), D., the measurements obtained from radiochemical analyses of tissues and organs obtained at autopsy (Attachment A to this report), and E., the isotopic ratios of various samples (Appendix L and Attachment A).

A. Environmental Measurements:

Beginning with the first contamination episode involving Individual A on the evening of November 5th, 1974, smears and air samples from her work room did not indicate airborne activity. Her automobile showed only slight contamination of some switches at a maximum of .07 dps.

In her apartment the air concentration on November 7th was 2.4×10^{-12} microcuries per milliliter, just slightly above the level of 2×10^{-12} microcuries per milliliter which is permitted by AEC regulations for average airborne plutonium concentrations in occupied restricted areas for 40 hours in any period of 7 consecutive days. No more than 0.0003 grams of plutonium were identified in the contamination of the Individuals or their apartment.

B. Bioassay Data:

1. Urine - Individual A showed no urinary plutonium above background on 12 bioassays performed between August, 1972 and May, 1974. Following a possible small inhalation exposure on 31 July 1974, the urinary bioassays showed a gradual increase in activity, reaching a peak of 5.0 dpm/700ml. on the 25th of August and subsiding to baseline levels in samples of September 12th and October 8th.

The next two samples, I-22 and I-23, collected between October 15th and October 31st at home, showed levels 4 orders of magnitude above baseline. Sample I-24, collected at work in the same time period and left in Individual A's locker, was less than 1 dpm. Then I-25 and I-27, collected in the next week at home, were again 4 to 5 orders of magnitude higher. The remaining urine samples showed a return to fractional dpm values in a steadily descending order.

2. Feces - The samples collected shortly after the exposure incident of July 31st showed no difference in plutonium activity from that collected in the previous year. The remaining samples were collected beginning on November 6th in the course of the investigation of the recent contamination incident. Beginning at plutonium levels about 7 orders of magnitude above background, they showed a rapid fall with time over the following 7 days before Individual A's death.

C. In-Vivo Count Data:

In-vivo counting was carried out on Individual A on the 11th and 12th of November, 1974 at Los Alamos Scientific Laboratory. Their results are presented in Appendix C of the investigation report. Americium was detected equally in both sides of the chest, while plutonium was below the detection limit. Extrapolation from the americium level, using the isotopic distribution of a nasal smear as being representative of the inhaled material, resulted in estimation of 6 nCi of plutonium and .34 nCi of americium.

D. Post-Mortum Tissue Analyses:

Following the death of Individual A on 13 November 1974, an autopsy was performed. Tissues were removed to Los Alamos Scientific Laboratory for radiochemical analysis. The results of the tissue analyses, as summarized in the Los Alamos Scientific Laboratory report on Table 4.1 and Table 4.2, and their Appendix A summarizing all of the tissue data are appended as Attachment A to this report. It will be noted that the

fecal sample collected within the large intestine showed very similar activities to those obtained from pre-mortum fecal samples on November 12th and 13th. It should also be noted that the lung parenchyman contained at least 5 times as much activity as did the tracheo-bronchial lymph nodes.

The estimated organ burdens for plutonium are 3.6 nCi in liver, 5 nCi in lung, and less than 0.2 nCi in the bone. Since these are the major areas of plutonium deposition in the body, the Los Alamos Scientific Laboratory report concluded that the total plutonium body burden was under 10 nCi or less than 25 percent of the maximum permissible body burden for occupational exposure (40 nCi). The low value in the bone, and the relatively low value in the tracheo-bronchial lymph nodes compared to that in the lungs, suggested to Los Alamos Scientific Laboratory personnal that the major portion of the plutonium exposure was of recent origin, probably less than 30 days prior to death. The Los Alamos Scientific Laboratory report pointed out that because of the small sample size analyzed thus far and the resulting extrapolation uncertainties, the results must be used cautiously.

E. Isotopic Ratios:

Isotopic ratios were calculated from the results of the radiochemical analyses of environmental samples, excreta and post-mortum tissue samples. Ratios examined were those of plutonium-239 (plutonium-239/240 in HSL analyses) to plutonium-238; and plutonium-239 to americium-241.

The plutonium-239 to 238 ratio ranged from 5.9 to 10.0 with a mean of 7.9. There were no systematic deviations from the mean either by type of sample analyzed or by laboratory performing the analysis.

In general, the plutonium to americium ratios showed a greater range. Environmental samples, nasal smear and fecal samples had an average ratio of 16 with a range from 11 to 26. Samples collected at autopsy showed ratios of 16 for intestinal feces, 32 for liver and 19 for lung.

Isotopic ratios could be determined in two of the urine samples, I-25 and I-27, both of which had high activity levels. The ratios were 5.7 and 6.0.

Discussion and Conclusions:

1. The environmental levels do not suggest a high likelihood of the acquisition of a internal body burden of plutonium exceeding the occupational permissible limit by orders of magnitude, as the initial urine and fecal counts associated with this incident (I-26, I-27) suggested.

2. The results of in-vivo counting and tissue analysis are in reasonably good agreement as to magnitude of internal contamination, i.e. less than 10 nCi or 25 percent of the occupational "permissible body burden".

3. The plutonium-239 to 238 ratios of all samples are in general agreement. The plutonium-americium ratios of nasal smears, fecal samples, tissues and samples of home and work environment are also in reasonably good agreement. The fecal and urinary radioactivity levels after 7 November and the autopsy findings are compatible with the ingestion and inhalation of radioactive material a short time earlier than that date. These data suggest that the environmental contamination, the intake, the internal deposition and the fecal excretion could all have involved the same radioactive material. The fact that the Pu-Am isotopic ratios in the only two urine samples in which the analysis could be obtained are 5.7 and 6.0, could reflect a different contaminant and/or the body's greater facility for renal excretion of americium compared with plutonium.

4. Analyses of urine samples I-22, I-23, I-25 and I-27 gave results which are not in accord with the above mentioned internally consistent data. Discordant findings related to the samples include the following:

a. The high levels of activity in urine samples I-22 and 23 preceded the detection of any personal contamination of Individual A when monitored at her work place.

b. The one sample, I-24, which was apparently collected and kept at the plant has an activity level 4 orders of magnitude below the others mentioned. Such a variation in the excretion of plutonium and americium from high level to low level to high level over a few days is biologically unlikely.

c. It is biologically unlikely that the small body burden of a comparatively insoluble plutonium compound measured by in-vivo counting and in post-mortum tissue could have been so much larger 4 or 6 days earlier as to result in the high level of radioactivity seen in sample I-27.

5. Based on the above findings, it is inferred that activity found in urine samples I-22, I-23, I-25, and I-27 represents exogenous contamination and that remaining bioassay, environmental, in-vivo counting and post-mortum tissue findings are the result of a recent intake of Pu-Am material resulting in a plutonium body burden of less than 10 nCi or 25 percent of the occupational exposure limit.

Individual B:

In this individual the evaluation of the magnitude of exposure and of any resultant body burden involved examination of four sets of data. These are A., information obtained by monitoring the home environment of the individual (Appendix B), B., the results of urine and fecal excretion bioassays (Appendix J), C., the results of the in-vivo internal radioactivity measurement (Appendices C and D), and D., the isotopic ratios of various samples (Appendix L).

A. Environmental Measurements:

Contamination levels in the apartment which Individual B shared with Individual A have been included in the R.O. investigation report. Individual B's car showed no evidence of contamination.

B. Bioassay Data:

1. Urine - Individual B showed no plutonium activity in 2 samples tested in 1974 between January and July. Slight plutonium activity was detected beginning November 8th and peaking on November 9th. By November 11th and 12th the activity had fallen below detection limits, where it remained through November 20th.

2. Feces - The first fecal sample, collected at Los Alamos Scientific Laboratory on November 11th, showed a level of radioactivity 3 orders of magnitude above background. Subsequent fecal samples, beginning with that of November 12th, showed very little or no activity.

C. In-Vivo Count Data:

In-vivo counting was carried out on Individual B on the 11th and 12th of November 1974 at Los Alamos Scientific Laboratory. The results are presented in Appendix C of the investigation report. No internal contamination was found.

D. Isotopic Ratios:

Two fecal samples, J-10 and J-23, revealed isotopic ratios of plutonium to americium of 18 and 15. These are well within the range of those found in the environmental samples of the apartment and in the fecal samples of Individual A, which averaged a ratio of 16.

Discussion and Conclusions:

1. Environmental levels do not suggest a high likelihood of the acquisition of a body burden of plutonium exceeding the permissible occupational limit by orders of magnitude.

2. The results of the urine and fecal bioassays, and the isotopic ratios suggest that Individual B's contamination probably involved the same radioactive material as found in Individual A and that the ingestion and inhalation took place shortly before the first positive bioassay result.

3. In view of the negative in-vivo counting result, and the relatively low level quantity of radioactive contaminants in the urine and feces, any internal deposition would have to be of a very low order of magnitude or a few percent of the permissible occupational burden at most. Since most of the activity simply passed through the gastrointestinal tract where absorption is minimal, the body burden, if any, is so small that there is no significant health hazard from this exposure.

Individual C:

In this individual the evaluation of the magnitude of exposure and of any resultant body burden involved examination of four sets of data. These are: A., the information obtained by monitoring the environment of the individual (Appendix B), B., the results of urine and fecal bioassays (Appendix K), C., the results of the in-vivo internal activity measurements (Appendices C and D), and D., the isotopic ratios of various samples (Appendix L).

A. Environmental Measurements:

Since Individual C had not worked at the Kerr-McGee plant since September, 1974, the probable source of contamination was the apartment of Individuals A and B. The levels of the contamination there have already been described in this report. Neither Individual C's residence nor his automobile showed any evidence of radioactivity.

B. Bioassay Data:

1. Urine - Appendix K reveals no plutonium detectable in urine samples collected intermittently from June 1971 until September 20th, 1974, after which the individual terminated his employment with Kerr-McGee. Urine samples produced on November 11th through 13th showed no increase over the past.

2. Feces - One fecal sample voided on November 11th was found by Los Alamos Scientific Laboratory to have a slight amount of plutonium and americium contamination. Subsequent samples on the 13th and 14th of November showed virtually no activity.

C. In-Vivo Counting:

In-vivo counting was carried out on Individual C on the 11th and 12th of November, 1974 at Los Alamos Scientific Laboratory. The results are presented in Appendix D of the investigation report. No plutonium or americium activity was detected.

D. Isotopic Ratios:

A plutonium to americium ratio of 9 was reported for the one fecal sample in which such data could be obtained.

Discussions and Conclusions:

1. The environmental levels in the apartment of Individual A and B were sufficiently low and the amount of time spent there by Individual C was comparatively small so the likelihood of the acquisition of a significant body burden exceeding the permissible limit by orders of magnitude is very low.

2. The absence of detectable activity in in-vivo counts and urine bioassays suggests that no significant internal contamination occurred in

Individual C. The very poor absorption to be expected by the passage of a relatively small amount of activity through the gastrointestinal tract likewise suggests that no significant body burden accumulated in this individual.

3. The comparatively low plutonium-americium ratio from the one analyzable stool sample is of uncertain significance since it is based on the analysis of a small sample with rather low levels of activity.

General Conclusions Concerning Biomedical Management:

1. Although the medical consultant for the Kerr-McGee company is knowledgeable and experienced, having served as medical director at the site in the past, his present location in another state makes it difficult to provide useful early input into the handling of contaminated individuals. In the present instance the magnitude and significance of the incident did not become clear and recognizable to the Kerr-McGee medical consultant until well beyond the time when his early intervention could have facilitated evaluation and disposition procedures for the three individuals concerned.

2. Capability of the local physician and clinic could not be assessed since the former was not a party to the interviews made in connection with this investigation.

3. Gross bioassay information was available locally through the Kerr-McGee research center with reasonable promptness. Their capability for carrying out accurate refined chemical isotopic analyses is not certain and should be tested.

4. The lack of local availability of any means for in-vivo assessment of plutonium and americium internal contamination is a major drawback in the biological and psychological management of contaminated individuals at this facility. Reliance on the capability of the Los Alamos Scientific Laboratory is a cumbersome means for obtaining such essential information although the reliability of the results is good.

5. Results of the biomedical investigations were provided to Individuals B and C in satisfactory fashion orally and in writing by the leader of the Health Division, Los Alamos Scientific Laboratory, and orally by the Kerr-McGee medical consultant.

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TABLE 4.1

SUMMARY OF TISSUE ANALYSIS RESULTS

Tissue Analyzed	Weight of Organ (g)	Weight Analyzed (g)	Activity (dis/min per gram) ^{239}Pu	Activity (dis/min per gram) ^{240}Pu	Activity (dis/min per gram) ^{241}Am	Isotopic Ratio (Percent of Total Activity) 239/240/241	Extrapolated Tissue Burden - $^{239-240}Pu$ dis/min	Extrapolated Tissue Burden - $^{239-240}Pu$ nCi
Duodenum								
Tissue	73.4[a]	7.0	N.S.[b]	N.S.	N.A.[c]			
Chyme		<0.1	122	28	0.1	84/14/0		
Intestine, Large								
Trans. Colon	113.9[a]	30.9	0.08	N.S.	0.01			
Feces		19.5	34.3	4.2	2.4	84/10/5		
Intestine, Small								
Tissue	386[a]	17.3	0.04	N.S.	N.A.			
Chyme		3.3	0.3	0.1	N.A.			
Liver	1311	19.0	5.4	0.7	0.2	86/11/3	0.8×10^3	3.6
Lung, Whole	995							
Parenchyma		17.2	10.1	1.3	0.6	84/11/5	1.1×10^3	5.0
Pleura		16.6	N.S.	N.S.	N.A.			
Lymph Nodes								
Periportal		3.3	0.2	N.S.	N.A.			
Tracheobronchial		6.7	1.8	0.3	0.1	82/14/4	1.4×10	.01
Stomach Wall	132.8	8.8	1.0	0.1	0.01	90/9/1	1.3×10^2	.06

[a] Including contents

[b] N.S. = not significant

[c] N.A. = not analyzed

TABLE 4.2

SUMMARY OF BONE ANALYSIS RESULTS

Specimen	Weight Received (g)	Weight Analyzed (g)	Activity (dis/min per gram) ^{239}Pu	Activity (dis/min per gram) ^{238}Pu	Extrapolated Skeletal Burden (nCi)
Rib	54	20	N.S.*	N.S.	—
Sternum	256	31	0.03	N.S.	0.14
Vertebra	81	33	0.01	N.S.	0.05
Femur	93	45	N.S.	N.S.	—

*N.S. = not statistically significant from background count level of 0.03 dis/min per sample aliquot.

Oklahoma Worker's Compensation Law*

85 Oklahoma Statutes § 11 [in pertinent part]

Every employer subject to the provisions of this Act shall pay, or provide as required by this Act, compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury, and in the event of disability only, except where the injury is occasioned by the willful intention of the injured employee to bring about injury to himself or of another, or where the injury results directly from the willful failure of the injured employee to use a guard or protection against accident furnished for his use pursuant to any statute or by order of the State Labor Commissioner, or results directly from the intoxication of the injured employee while on duty . . .

85 Oklahoma Statutes § 12

The liability prescribed in the last preceding section shall be exclusive and in place of all other liability of the employer and any of his employees, at common law or otherwise, for such injury, loss of services or death, to the employee, spouse, personal representative, parents, dependents, or any other person, except that if an employer has failed to secure the payment of compensation for his injured employee, as provided in this Act, then an injured employee, or his legal representatives if death results from the injury, may maintain an action in the courts for damages on account of such injury, and in such an action the defendant may not plead or prove as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee; provided, that this Section shall not be construed to relieve the employer from any other penalty provided for in this Act for failure to secure the payment of compensation provided for in this Act.

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* Prior to 1978, known as the "Workmen's Compensation Law." The above-quoted sections were in effect at the time of Silkwood's alleged injury.

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No. 81-2159

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

BILL M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, Deceased,

Appellant,

v.

KERR-McGEE CORPORATION, a Delaware corporation, and KERR-McGEE NUCLEAR CORPORATION, a Delaware corporation,

Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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September, 1982

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INTRODUCTION

The Appellant, Bill M. Silkwood, Administrator of the Estate of Karen G. Silkwood, deceased, respectfully submits this Brief in Opposition to the Appellee's Motion to Dismiss or Affirm.

In this Motion, Appellees have suggested to this Court that Appellant has given the Court a slanted, unsupported and misleading version of the facts of the case. Appellees would have this Court believe that there was no factual basis whatever for the jury's award of $10 million punitive damages.

Appellees further suggest to this Court in their Motion to Dismiss that this Court lacks appellate jurisdiction over this appeal because Appellant has failed to demonstrate that the Tenth Circuit considered Oklahoma's punitive damages statute when it ruled that the jury's $10 million punitive award was absolutely preempted.

Appellees ask this Court to summarily affirm the judgment below, claiming that it was correct, supported by other grounds and involves too insubstantial an issue to warrant this Court's consideration on the merits.

As demonstrated below, Appellee's varied contentions range from dubious to frivolous. There was a substantial, indeed compelling, evidentiary basis for the jury's $10 million punitive damages verdict. This appeal does come within this Court's appellate jurisdiction. The Tenth Circuit preempted

the jury's punitive damages verdict on grounds that any award of punitive damages would substantially compete with regulation of commission--thus holding Oklahoma's punitive damage statute, which authorizes punitive damages, to be repugnant to the Atomic Energy Act.

Moreover, the far-reaching implications of the Tenth Circuit's decree of absolutely immunity to punitive damages for nuclear facilities, and the Circuit's departure from the preemption standards established by this Court, demand full consideration of the issues on the merit by this Court.

That the Tenth Circuit's opinion presents substantial and serious disruptions to the allocations of authorities between the federal and state governments is indicated by the thirteen states which have urged this Court as amici curiae to note jurisdiction over this appeal and reverse the Tenth Circuit's ruling.

Because the Tenth Circuit unquestionably held the state statute of Oklahoma authorizing punitive damages to be repugnant to the Atomic Energy Act, this case falls within this Court's appellate jurisdiction. Consequently, this Court is faced with the choice of summarily affirming this highly questionable decision and making it the binding law of the land--despite the protestations of at least 13 states--or it must note probable jurisdiction and review the Tenth Circuit's opinion on the merits. This is simply not the kind of case for which summary affirmance is appropriate. It is inconceivable

that this Court would adopt, without full review, such a broad-sweeping deprivation of the rights of citizens of virtually every state to the protections of their state's punitive damages laws with regard to egregious, grossly-negligent or even intentional misconduct by operators of nuclear facilities.

I. STATEMENT OF FACTS

Appellees have suggested to this Court that Appellant's Statement of Facts is "slanted," "unsupported" and misleading. Appellees further claim that the record is devoid of evidence which would justify punitive damages.

Appellees' contentions are disingenuous, to say the least. Although the jurisdictional statement's factual statement was not, due to space restrictions, fully annotated, Appellant provided detailed references to the record in the Brief to the Tenth Circuit. So that this Court can see that Appellant's Statement of Facts was neither slanted nor unsupported, the Statement of Facts from one Tenth Circuit Brief and portions of the Brief detailing the evidence of Appellee's gross negligence, willful disregard and actual malice are attached as appendices to this Brief. As these discussions and the portions of the record cited within them demonstrate, there was abundant, indeed compelling, evidence of Appellees' gross negligence, reckless disregard for the safety of Karen Silkwood, other employees and the public at large, and of Appellees' actual malice toward Karen Silkwood.

Also attached as an appendix are all of the excerpts of James Keppler's testimony included in the Appendix by Appellee as well as by Appellant.

Appellees point to a concession by Appellant's counsel that we could not prove precisely how Karen Silkwood's contamination occurred (Motion at 4) as the prelude to asserting that "Having failed to prove how the exposures occurred, it is axiomatic that they were not proven to be the product of malice." (Motion at 4)

The only problem with this statement is that Appellees conveniently ignore the fact that the jury expressly found that Karen Silkwood's contamination was proximately caused by Appellees' negligence and also found that punitive damages--requiring gross negligence and a reckless disregard for the rights of others and/or actual malice--were warranted.

The Tenth Circuit's opinion did not indicate in any way that the jury's punitive damages judgment lacked the requisite evidentiary support, nor could it. The opinion concluded that no punitive damage award could be allowed--no matter how reckless or egregious the conduct--because a punitive damage award would be repugnant to the federal regulatory scheme.

As the record citations in the appendix demonstrate, there was ample evidence of reckless disregard for the rights of Karen Silkwood and her co-workers and for the public to support a punitive damages verdict. Appellees' statements about their regard for Karen Silkwood and about their physical

security system are greatly contradicted by the evidence cited in the appendix. The jury heard Appellees' contentions and their evidence and, confronted with contradictory facts, found against Appellees on these issues.

II. APPELLATE JURISDICTION

Appellees argue that this appeal should be dismissed because the opinion below did not, in so many words, hold a state statute to be "invalid as repugnant to the Constitution treaties or laws of the United States," as required by 28 U.S.C. §1254(2).

Appellees concede (Motion at 2) that the Court below held that a judicial award of exemplary damages under state law was preempted. They contend that the requirements of 28 U.S.C. §1254(2) were not satisfied because the opinion below made no specific mention of the specific state statute invalidated, i.e., 23 O.S. §9, and that Appellant failed to demonstrate any consideration of the Oklahoma statute by the Tenth Circuit. This argument verges on the frivolous.

In Oklahoma, punitive damages are statutory. They can only be awarded if the statutory requirements of 23 O.S. §9, as clarified by case law, are met. If the legal requisites are met, it is reversible error, under Oklahoma law, for a trial judge to refuse to submit punitive damanges for the jury's consideration. State, ex rel, Pollution, etc. v. Kerr McGee Corporation, 619 P.2d 858 (Ok. 1980); Oller v. Hicks, 441 P.2d 356 (Ok. 1967); Sopkin v. Premier Pontiac, Inc., 539 P.2d 1393 (Ok. App. 1975).

As noted, the Court below did not dispute the adequacy of the evidence for punitive damages. Nor did it find fault with the trial court's jury instructions respecting punitive damages. The sole basis for the appellate court setting aside the jury's $10 million punitive damages verdict was its conclusion that a punitive damages award under state law would substantially compete with the federal regulation of nuclear facilities established by Congress in the Atomic Energy Act, 42 U.S.C. §2011, et seq. The decision totally forecloses punitive damages against nuclear facilities because of the perceived repugnancy of such a state law-based award to the Atomic Energy Act and federal regulatory program. If that is not a determination that a state law is repugnant to a federal law, no preemption decisions are.

Since the punitive damages awarded were authorized by and returned in accordance with Oklahoma's punitive damages statute, the Court below necessarily found the authorizing statute, as applied to nuclear facilities, to be preempted when it found the jury's punitive verdict preempted. Prior decisions of this Court have made clear that a decision holding a statute pre-empted as applied falls within the appellate jurisdiction of this Court. The fact that the Tenth Circuit's opinion does not explicitly mention 23 O.S. §9 as the statute whose application it held preempted cannot operate to place the Circuit's decision outside the appellate jurisdiction of this Court.

It is also misleading in the extreme for Appellees to suggest that the Tenth Circuit did not consider the statute and the preemption issue. Appellant briefed the issue of the preemption standard for pre-existing tort remedies at length, and presented the statutory basis for punitive damages at page 2 of our Appellate Brief.

It is ironic that Appellees seek to avoid an appeal by the absence of a discussion of the statute in the court's opinion.

There was no discussion of the absolute preemption of the statutory authorization of punitives because such an extreme position was not claimed by Appellants or contemplated as a court ruling in their wildest dreams.

III. MOTION TO AFFIRM

In their Motion, Appellees ask the Court to summarily affirm the holding of the Tenth Circuit on both federal and non-federal grounds. As to the federal grounds, Appellees assert that the Court below correctly held the imposition of punitive damages preempted and that the opinion did not deprive citizens of any common law or Constitutional rights.

Appellees also urge the Court to avoid exercising its plenary power since the underlying basis for punitives--the personal injury award--was eliminated by the appellate court when Workers' Compensation was held to be the exclusive remedy. Apparently, Appellees argue that although the $5,000 award of property damages will support punitive damages, that

amount is so small and the amount of punitives which this award will support so insubstantial that "any federal question presented is not substantial." (Motion, page 18)

For non-federal grounds, Appellees argue that since compliance with relevant Atomic Energy Commission regulations precludes the award of punitive damages and punitive damages may not be awarded without evidence of malice or wanton conduct, the Court should summarily affirm the decision below.

None of Appellees' arguments justifies a summary affirmance of the Tenth Circuit's highly controversial decision without full consideration by this Court. The federal questions presented by the decision are by no means insubstantial.

At least 13 states perceive the decision as a legally unsound and disturbing usurpation of state powers, a nullification of important state and citizen rights and a dangerous extension of federal preemption. Also, as noted below, the Appellees' arguments against exercise of plenary power rest on certain untrue factual and legal premises and omit several significant points.

A. Exercise of Plenary Power

Appellees assert that the holding and impact of the decision below have been distorted and that this appeal "seeks an unwarranted disruption in the orderly, and hereto consistent, growth of the law surrounding federal regulation of radiation hazards." (Motion at 9)

Although Appellees would imply that the Tenth Circuit's opinion merely followed the orderly and consistent pattern of the law which preceded it, the decision is, in fact, a radical departure from previously established preemption standards and parameters. In fact, the decision went far beyond what even the Appellees had argued for before the Circuit. Both Appellees and the nuclear industry's trade association, the Atomic Industrial Forum, in an amicus brief, did not claim that punitive damages were absolutely preempted--only that they were preempted where substantial compliance with applicable federal regulations was proven.* (See Appellee's Brief to the Tenth Circuit at 40-48; Atomic Industrial Forum's Amicus Brief at 25.)

Appellees argue that the Court's plenary power--the entertainment of briefs and argument--should not be exercised by the Court since the court below was "merely following sound established legal precedent of this Court and the lower federal courts." (Motion, page 9) Perhaps the most eloquent rejoinder to this placid scene painted by Appellees is the response of 12 sovereign states who are urging the Court to exercise its power to correct this "uncharted expansion of preemption beyon

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*Of course, Appellees' argument failed to address the fact that the jury had been presented with evidence that Appellees had in fact not substantially complied with all applicable regulations and the fact that the jury was instructed that substantial compliance with regulations, if found, would be entitled to the strongest and possibly conclusive consideration by the jury as negativing, or proving lack of, bad conduct necessary for an award of punitive damages.

its present contours [which] could seriously upset the carefully maintained balance in federal-state relations reflected in contemporary preemption doctrine." (Amicus Brief, page 2)* Indeed, there is trouble in Appellees' paradise: This is the first case to award punitive damages in a nuclear tort and the first to preempt such damages; it establishes a per se bar to punitives in nuclear torts regardless of intentional or criminal conduct without any expression of any Congressional intent for such a result and in the fact of Congressional pronouncements that state tort law is to control; it holds punitives are unavailable for an Extraordinary Nuclear Occurrence under the Price-Anderson Act procedures, again without any basis for the legislative history; it extends the moribund Northern States doctrine and establishes a wholly unprecedented novel preemption test; and it ignores the clear Constitutional impact of Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1970).

Far from "simply" holding punitive damages preempted (Motion, page 9), the opinion raises serious public policy, jurisdictional and legal questions which deserve this Court's full review.

Given the precedental, binding national effect of a summary affirmance of the decision below, the Court should not

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*Nevada, New York, Ohio, Alaska, Arizona, Hawaii, Louisiana, Maine, Massachusetts, New Jersey, New Mexico and South Carolina have joined in an amicus brief urging this Court to accept jurisdiction and to reverse the Tenth Circuit's decision. Minnesota filed a seperate brief urging the same result.

grant this opinion its imprimatur without collectively and fully considering the implications of this holding on the rights of citizens and the states themselves, and the inconsistencies of the decision with other decisions of this Court.

B. Substantial Federal Question

Appellees argue that the federal questions presented by this appeal are not substantial because the Tenth Circuit overturned the $500,000 personal injury verdict and left undisturbed only the $5,000 portion of the verdict awarded for the property damage caused by the contamination.

There are several serious flaws in Appellees' argument.

The significance of the federal question raised by the Tenth Circuit's decision is not determined by the amount of punitive damages to which Appellant might conceivably be entitled. The court below held that any award of punitive damages is preempted--a far-reaching pronouncement which affects citizens, states and nuclear facilities across the Country, no matter how much money Appellant stands to individually receive or lose from punitive damages.

Appellees' suggestion that the underlying bases for a punitive damage award no longer exists (Motion at 18) is, simply, untrue.

The jury found Appellees to have engaged in a reckless and willful disregard for the rights of others--a determination unaltered by the Tenth Circuit. The evidence of Appellees' recklessness and disregard for the rights and

safety of others was equally applicable to the $5,000 property damage as to the personal injuries which the jury determined to be $500,000. Even the $5,000 property damages will support punitive damages in a not unsubstantial amount.*

Additionally, the question of Appellees' liability for the personal injuries suffered by Karen Silkwood is by no means finally resolved, as suggested in Appellant's Jurisdictional Statement at page 6, note 5.

Under Oklahoma law, an employee who is intentionally or willfully injured by his or her employer is entitled to sue for such injuries in a common law action as if the Workers' Compensation Law did not exist. Hull v. Wolfe, 393 P.2d 491, 493 (Ok. 1964).

The trial court limited the introduction of evidence by Appellant which would go to establishing an intentional or willful contamination by Appellees because of the court's ruling that the case was not subject to the Workers' Compensation courts and because Appellant also had theories of negligence and gross negligence. As one example, the court

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*Appellees' assertion that a 20-to-1 ratio between the actual damages and the punitive damages awarded by the jury was per se excessive was rejected in the trial court's opinion [see, Silkwood v. Kerr McGee Corp., 485 F.Supp. 566, 589-591 (1979)] and not reached by the Tenth Circuit. Appellees' ratio argument has been expressly rejected by the Oklahoma Courts--see, Timmons v. Royal Globe Ins. Co., 53 OBAJ 1898 (Ok. August 7, 1982)--upholding a punitive award 44 times an actual award. Thus, using Appellees' own peculiar legal calculus, a punitive damage award of at least $220,000 with actual damage of $5,000 would not be per se excessive.

limited evidence as to anti-union attitudes by Appellees' plant manager. See tr. 7624. Appellant's trial strategies, evidence, jury arguments and requested instructions were all formulated and presented in reliance on the court's rulings. See, e.g., tr. 10,641.

If the jury's determinations are not sufficient by themselves to establish an entitlement to recovery on a Hull v. Wolfe type of common law cause of action, Appellant may still be entitled to a new trial on the issue of an intentional or willful contamination. The trial court recognized that there was a common law right of action for an intentional contamination. See tr. 1068.

Thus, the issue of Appellant's entitlement to punitive damages is by no means moot. There is an actual damage award as well as a jury determination that Appellant had the degree of culpability necessary for a large punitive damage award, and the trial court concurred when it refused to set aside or alter the jury's verdict. See, 485 F.Supp. at 591.

C. Non-Federal Grounds

In offering alternate grounds, admittedly inarticulated by the appellate court, for the Court to summarily affirm the opinion below, Appellees simply misstate Oklahoma law. Oklahoma law has never acknowledged the "compliance" defense asserted by Appellees. As to negligence, Oklahoma follows the almost universal rule that compliance with statutory or

administrative requirements does not preclude a finding of negligence, but is merely evidence of use of due care. Transport Indemnity Company v. Page, 406 P.2d 980 (Ok. 1965); McBroom v. Mayer, 303 P.2d 303 (Ok. 1956); Kansas O.&G. Ry. Co. v. Clark, 262 P. 426 (Ok. 1903). Where the common law standard of due care greatly exceeds the administrative minimum, as here, Oklahoma law would not bar punitives where conscious indifference to the consequences of an act or reckless disregard of the rights of the injured was demonstrated.

Appellees stake their argument that punitives are precluded on their contention that "The record is clear that Kerr McGee was in compliance with AEC regulations as they related to Silkwood's alleged injury and property damage." Motion at 20.

The record by no means clearly indicates that Kerr McGee was in compliance as is illustrated by the material excerpted from Appellant's Brief to the Tenth Circuit included in Appendix C attached.

Contrary evidence was offered which indicated that Appellees had, in fact, violated various standards directly applicable to Silkwood's injuries. The jury found against Appellees and their determination had an adequate evidentiary basis as the discussion in Appendix C reveals. On appeal, the jury's resolution of the evidentiary conflict against Appellees must be respected. The Tenth Circuit, like other

courts across the Country, has repeatedly held that the jury is the exclusive judge of the credibility of witnesses and the weight to be given particular pieces of evidence, Boehm v. Fox, 473 F.2d 445 (10th Cir. 1979), especially with regard to experts. Swearngin v. Sears Roebuck & Co., 376 F.2d 637, 643 (10th Cir. 1967). On appeal, the evidence must be viewed in the light most favorable to the party which prevailed at trial, along with all inferences that may reasonably be drawn from such evidence. Ahearn v. Veterans Administration, 537 F.2d 1098, 1100 (10th Cir. 1976).

In short, despite Appellees' efforts to retry their case, this Court must accept the fact that Appellees were not in compliance with all applicable regulations, and consider Appellees' amenability to punitive damages accordingly.

Oklahoma law also does not require "proof of evil intent" before punitives may be awarded. Motion at page 21. Rather, evil intent may be inferred from wanton conduct. Foster v. Emery, 495 P.2d 390, 392 (Ok. 1972); McCorkle v. Great Atlantic Ins. Co., 637 P.2d 583, 586 (Ok. 1981). Wanton conduct is conduct which exhibits a conscious indifference to consequences in circumstances where the probability of harm is readily apparent. Foster v. Emery, supra; Barrall Food Stores, Inc. v. Bennett, 153 P.2d 106, 110 (Ok. 1944).

Thus, punitive damages under Oklahoma's statute may be awarded where there has been a reckless and wanton disregard of another's rights. Misco Leasing Inc. v. Keller, 490 F.2d

545, 549 (10th Cir. 1974). Tomlinson v. Bailey, 289 P.2d 384, 385 (Ok. 1954).

Appellees' final contention--that there was no evidence of malice or wanton conduct--is as invalid as its description of the applicable law.

As both the jury and the reviewing trial court found, there was ample evidence of reckless and wanton conduct along with evidence of actual malice directed toward Karen Silkwood. This evidence is discussed in Appendix B attached. The fact that Appellant conceded an inability to explain the precise mechanism by which Ms. Silkwood's contamination occurred is by no means the same as conceding an inability to prove that Appellees caused the injury. Appellee chooses simply to ignore the jury's finding that Appellees' gross negligence was indeed the proximate cause of Karen Silkwood's personal injuries and property damage, a finding which this Court must respect.

IV. CONCLUSION

Despite Appellees' efforts to muddy the waters, the discussion above demonstrates that there was a solid evidentiary and legal basis for the jury's $10 million punitive damage verdict against Appellees.

This verdict which was rendered by a conscientious jury after an 11-week trial was nullified by a Circuit Court decision which attempted to re-weigh evidence and which created new law regarding the burden of proof and Workers' Compensation

jurisdiction and the preemption of a statutorily-authorized tort remedy.

The Tenth Circuit's expansion of preemption and its unconcern at the lack of any expressed Congressional intent that punitive damages be preempted make its decision a dangerous precedent unjusitifed by the preemption standards previously laid down by this Court. The decision is unjust not only to Appellant but to states and their citizens across the Country who stand to lose the protections of state punitive damage laws against reckless and wanton conduct by nuclear facilities.

Thirteen states across the Country have joined with Appellant in urging this Court to note jurisdiction and reverse the Tenth Circuit's ruling. Obviously, the appeal presents substantial federal questions which fall within this Court's appellate jurisdiction and which call for exercise of this Court's plenary powers.

Appellant respectfully urges that this Court note probable jurisdiction and set this case for briefs on the merits and oral arguments.

Respectfully submitted,

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STATEMENT OF FACTS

Background

As part of its broad involvement in mining, milling, and manufacturing of fuels for the nuclear industry, KM operated a plant some 30 miles north of Oklahoma City called the Cimmarron Facility. The facility contained uranium and plutonium fuel fabrication plants located in adjacent buildings and jointly administered by a manager and associated staff, Dx 141, R. v. 19.

The facility was licensed and periodically inspected by Atomic Energy Commission (AEC - now the NRC) inspectors. KM's license and AEC regulations imposed operational requirements which represented minimum standards and not a full assurance of safety, tr 8152, 8221-2, 8245. The AEC expected the licensee to exercise care beyond AEC's requirements if more was demanded by reasonable prudence, tr 8221. Ex-KM employees said KM knew when "unannounced" AEC inspections were coming and "cleaned things up," in anticipation, tr 1708, 2297, 1389, 3154.[1]

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[1] AEC requirements are discussed, where applicable, in the body of this brief. KM asserts its "substantial" compliance with AEC regs as a liability shield. The evidence was, however, that KM was not even in "substantial" compliance; it violated AEC requirements at least 75 times, tr 8176, and violated AEC requirements pertinent to Ms. Silkwood's exposure specifically (see p. 98). AEC Regional Director Keppler, KM's own witness, gave the plant a "C" on its performance, tr 8199 -- "I could see no evidence that Kerr-McGee management was on top of the operation," tr 8218, Px 154, R. v. 13. Plaintiff's expert, world-renowned health and safety leader Dr. Karl Morgan, for 25 years with the AEC's Oak Ridge facility, gave the plant an "F" on its performance (tr 1568-9) and referred to a callous and hardened disregard for safety by KM's management.

Karen Silkwood was employed as a laboratory analyst at this plutonium plant from August, 1972 until her death on November 13, 1974. Plutonium was utilized in the production process in various physical forms. Plutonium is a man-made, radioactive element used in nuclear weapons and fuels. It is explosive, flammable, toxic and a highly potent carcinogen, (as KM recognized, tr 4967, 9385) rendering it ultra-hazardous and activities involving its handling, abnormally dangerous, e.g. tr 766-77, 932, 935-42, 978, 1555-7, 1560, inst. 7, 9. It is measured in units of weight and energy[2] that reflect its high toxicity in even microscopic amounts.[3]

KM recognized that because of its hazards,[4] the plutonium entrusted to it had to be "absolutely contained," tr 4502, 4736, 7660.

KM's containment of the ultrahazardous plutonium entrusted to its custody was far from "absolute": between 1971 and 1975 KM's employees were exposed to the harmful radiation in some 574 separate contamination incidents, (Px 28, passim, R. v. 11). KM's physical security system permitted "biologically significant" quantities of plutonium to escape undetected, and in October of 1974, over 30,000 grams of plutonium could not be accounted for by KM's inventory and "accountability" system, (tr 7964).

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[2] Weight is measured in grams (1/30 oz); biologically significant qualities typically in nanograms (a billionth of a gram) or picograms (a trillionth of a gram). Energy is measured in curies, Ci, or corresponding fractional equivalents, nCi and pCi, tr 822, 1050, 1042, cf Amic. Br.5.

[3] The nature and extent of the biological harms caused by plutonium are extensively discussed in the testimony of Drs. Gofman and Martell see e.g. tr. 724-33, 735-9, 742-7, 750-63, 919-23. The extraordinary qualifications of these two experts as well as of plaintiff's other expert, Dr. Karl Morgan, are set out in their resumes, Px 1 (a), 1 (b), & 1 (c), R.v. 9.

Workers at KM's plant were represented by a local of the Oil, Chemical and Atomic Workers (OCAW) Union., which Karen had joined soon after she began work at the plant.[5] Karen increasingly became concerned about health and safety problems at the plant and the lax attitude of KM toward these problems, tr 1977, 2290, 3213. In August, 1979, she was elected as one of the three members of the union negotiating team, with responsibility for health and safety matters in particular, tr 7761-2. In September, 1974, the three committee members (Silkwood, Tice and Brewer) travelled to Washington, D.C., met with OCAW leaders, and the next day presented charges of numerous dangerous health and safety violations to AEC staff members, tr 3123-5, 3148-53, Px 63-A, R.v. 13.

Footnotes continued from preceding page

[4] As KM recognized, the most serious risk was that of inhalation, (e.g. tr 5763, 617). Once inside the body, even microscopic quantities of plutonium continuously emit thousands of powerful "alpha" particles per minute which inflict serious and irreversible damage to cells, producing genetic damage and mutations that make cells cancerous. See citations in note 3, supra, also 54 1721-2. The biological hazards from alpha particles have long been recognized, see tr 938-9, 1728-30, 1759-60.

[5] Although certain KM officers denied it, KM management was strongly anti-union, tr 3127. It had "crushed" an OCAW strike at the plant in 1973, using newly hired, untrained employees to (dangerously) maintain production during the strike, tr 3127, 3196-7, 7808, 7760,6580. Px 285, R.v. 13. Facility manager Moore had urged employees to vote to decertify the union (tr 7757-62, Px 182, 183, R.v. 13) and had been comended by KM top management for his handling of the strike, tr 7760-1. KM repeatedly blamed the union for its own deficiencies. See e.g. tr 7519-2, 7601-5.

[6] The three OCAW committee leaders, as well as other union members (e.g. tr 2299, 2302-6, 2654), were all subjected to retaliation. Brewer was punitively reassigned to an undesirable work location called the "rockpile", fired, and was later re-hired by NLRB arbitration, tr 1272-3; Tice was likewise relegated to the rockpile, Id. Karen Silkwood was similarly reassigned to the rockpile, tr 7685-89, 7698, Px 291, R.v. 13, blamed for her contamination, tr 7589-91, 6268, 6298, 7676, 3939, 3753, 7710, Px 226, R.v. 13, and pressure was put on her immediate supervisor to discredit her, tr 1267. In reply to a question by KM's counsel as to what possible motive KM might have for contaminating Ms. Silkwood's apartment, Mazzochi replied: to justify a search of her apartment and to undermine her credibility, tr 3264-6, 3238-9.

The AEC required documentation of the charges and Karen was assigned by OCAW leaders Wodka and Mazzochi the job of collecting documentaion for the allegations, while maintaining a low profile, tr 3136-7, 3217, 3239.

KM management was aware of the trip to Washington (tr 1266, 3220, 8472, 6577-8, 8504-5, 3728), and it was widely known that Karen was collecting damaging information at the plant in September and October, tr 2291-2, 8510-11, 6954-5, 7678.

Karen had also told the OCAW that there was evidence that X-rays of the fuel rods KM was fabricating were being illegally falsified or altered[7] (tr 3123-45, 3312), and a plan was devised where the evidence of this and the health and safety dangers would be turned over to New York Times reporter David Burnham, tr 3136.[8] Wodka and Mazzochi stressed to Karen that the charges of improprieties had to be documented (tr 3216-17) and were confident that Karen was documenting them, tr 3217, 3239, 3242-4. Karen collected information and recorded some of it in notebooks (Px 120A, 276, R.v.13, tr 3137, 3156, 3743) -- and relayed some of the information collected in phone conversations with Wodka which were recorded with her permission, Px 131, R.v. 13, tr 3138.

Footnote continued from preceding page.

[6] continued. Together this evidence was pertinent to KM's actual malice toward Ms.Silkwood and the unlikelihood of KM's claim that it was Karen who contaminated her apartment.

[7] The alleged falsification was of particular concern because of the danger that use of faulty fuel rods in the breeder reactor could potentially produce " a disaster of untold magnitude" tr 3207.

[8] OCAW leaders Mozzochi and Wodka candidly acknowledged that they hoped to use revelations of KM's health and safety improprieties and falsification of fuel rod documentation to bolster OCAW bargaining leverage and to defeat the effort to decertify the union.

Against this background, Karen Silkwood was contaminated on November 5, 6, and 7, 1974 by plutonium that had escaped from KM's custody. Her apartment was severely contaminated and had to be torn down and virtually all her possessions sealed up in 55-gallon containers and removed. The level of internal contamination of her body was established by competent expert testimony as having immediately inflicted serious bodily harm,[9] and producing severe mental anguish and emotional distress (related by at least seven witnesses -- Wodka, Jung, Smith, Moore, Sternhagen, Rosemary Porter, Merle Silkwood) before her auto accident death on November 13th.

Contamination Details[10]

NOV. 5

On November 5, 1974, Karen Silkwood reported early for work at Cimarron facility. After working for a number of hours, she detected contamination on her hands, Px 37,p.7, R. v. 18. KM health physics technicians were summoned. She was put on a 5-day bioassay collection program, and a bioassay kit was prepared by a technician and left on a hall shelf with her name and badge number on it.

Footnote continued from preceding page

[8] continued As part of the same effort they brought experts to the plant to lecture on plutonium's dangers. The lectures which were recorded - Px 132/1,2,3, & 4 - were attended by Ms. Silkwood and other KM employees.

[9] The nature of the bodily harm is detailed in the injury section, infra. pp. 74-77.

[10] The contamination details are described in KM's contamination incident report, Dx 27, R.v. 18, of 12/13/74, and the AEC's inspection report, Dx 37, R.v. 18, in tr 3743-53, and in the testimony of various KM employees, (Fine, Ford, Norwood).

Karen was scrubbed down and thoroughly decontaminated by a KM technician (tr 3472, 3568, 4987, 6064-5, 3494-6); before she left work in the early morning of November 6, she had no detectable contamination on her body, Px 272, R.v. 13, tr 3564, 4987, 6064-5.

KM employees and later AEC investigators tested the glove box gloves and found no leaks. They found no airborne contamination or other possible source of the contamination at the plant. See Dx 37, p. 8, app. A, R.v. 18.[11]

NOV. 6

On November 6, Karen worked the day shift so she could participate in union negotiations. She arrived early for her shift and worked in the lab on paperwork, but did not work in the glove boxes (which contained plutonium), tr 4692. Upon leaving her lab to attend a union meeting, she detected contamination on her right forearm, Dx 37, R.v. 18. Decontamination efforts with soap and water revealed the contamination to be "fixed" (tr 3534), so she was permitted to attend the union negotiating session, upon the stipulation that she would thereafter come back for completion of the decontamination, Id. tr 3533. During the union meeting, Karen confronted the facility manager with the fact that she was contaminated and that the company was doing nothing about it, tr 7708.

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[11] Although KM's communication to the AEC mentioned an alleged puncture in a glove box glove, Px 226, R.v. 13, p. 1, the ultimate conclusion of KM personnel on the scene, KM's Health and Safety Manager, the facility Manager and the AEC's investigation was that the November 5 contamination did not occur at the plant. Tr 3481-2, 3643-4, 3647, Px 199, R.v. 13, Px 20, R.v. 9, tr 4712, 7710-11 Dx 37, p. 1, R.v. 18.

Following the meeting, Karen reported back for further decontamination as directed. A nasal smear revealed plutonium in her nostrils which "did not seem possible", in the light of her lack of contact with plutonium that day, Dx 37, R.v. 18, tr 3536. Karen expressed her belief that plutonium was in her lungs and "working back out her nose"; since this "did not seem plausible", she was asked to report to the health physics office the first thing the next morning for further nasal smears. Id. At Karen's request, her locker at work and car were surveyed as possible contamination sources, but no contamination was found, tr 3542. She was successfully decontaminated before she was sent home, tr 3534.[12] She was very upset at the high nasal smear,[13] and began to cry, tr 3540-2.

NOV. 7

On November 7, 1974, at approximately 7:50 a. m., Silkwood reported directly to the health physics office bringing with her four urine and one fecal samples collected since November 5. Extremely

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[12] No at-work source of the contamination was found. KM does not explicitly claim that the 6th contamination "occurred" at work, only that it was "detected" at work. (p.33) Once again, however, KM's Health & Safety Mgr., Facility Mgr., and AEC investigation all concluded that the Nov. 6 contamination did not occur at the plant. Tr 4712, 7710-11, Dx 37, p.1 R.v. 18, Px 226, R.v. 13. See also tr 245-6 (concession by KM's counsel).

Despite the unexplained high nasal count, Karen was sent home without further medical attention by KM or any investigation as to a possible off-site source, tr 3500, other than the surveys of car and locker which Ms. Silkwood requested.

[13] Karen was very knowledgeable about plutonium and its biological hazards, tr 2291-2, 3063. She had attended lectures on the toxicity of plutonium, tapes of which - Px 131/1,2,3 & 4, R.v. 13 - were played to the jury. Her notebook, Px 120A R.v. 13, recorded in her own

high levels of contamination was detected in her nose and on her body, tr 4704, face and hands, tr 4704, 4707. Survey of the exterior of the urine and fecal kits showed no contamination, tr 4705, but a high level of plutonium was found inside the kits, tr 4709. [14] KM's Wayne Norwood realized that Ms. Silkwood and her kits were highly contaminated -- tr 4709, 4711 -- according to Norwood it was "a highly critical matter," tr 4966 and the source of her contamination was off-site, tr 4712. During her decontamination at the plant Karen Silkwood began to cry, tr 4714-15. KM's head of health and safety, Norwood, urged Karen to agree to an injection of DTPA, an experimental drug, but Karen was relectant and did not agree. [15] During the drive to her apartment with a KM crew, Karen was very upset at her contamination, tr 4726. Arriving at the apartment at approximately 1:30 p.m., tr 4726, Norwood and two other health physics technicians began surveying the apartment and Ms. Silkwood's roommate Sherri Ellis, tr 4728, and high contamination levels were discovered, tr 4729-30, in several rooms of the apartment,

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Footnote continued from preceding page

[13] Continued. handwriting such information as "plutonium - most toxic subst.","1,000 times more toxic than nerve gas" and "lethal dose size of pollen grain." Relevant excerpts from the notebook are included herein as Add. 3.

[14] Subsequent analysis revealed the plutonium in the kit to be insoluble i.e. not naturally excreted. Dx 37, R.v. 18. Karen Silkwood knew that insoluble plutonium could not be naturally excreted. See Add. 3 excerpt from Px 120A R.v. 8.

[15] Mr. Norwood whose degree was in poultry husbandry, tr 4937, was not medically qualified. DTPA had not been licensed by FDA for human use, was known to be ineffective against insoluble plutonium and was itself hazardous. See tr 3501-3, 5682, Px 114, R.v. 13. Dr. Gofman's medical opinion was that Karen had been wise in not submitting to the DTPA treatment, tr 826-7. See also tr 1584-5. Excerpts from Karen's notebooks show that she knew that DTPA was

Dx 37, p. 19, R.v. 18, tr 4729-30. [16] Highest contamination was found in the bathroom and on a package of cheese and bologna, Dx 37, p. 10, R.v. 18.

After ten or fifteen minutes, the team returned to the plant with Ms. Silkwood and Ellis to obtain more equipment and personnel to begin decontaminating the apartment, tr 4732-33, arriving back at aproximately 3:00 p.m., tr 4735. Norwood described Karen Silkwood as being extremely upset during the trip back to the plant, tr 4735. Gathering full protective clothing, respirators, plastic bags, and 55-gallon barrels, the team with Ms Silkwood returned to the apartment, [17] tr 4736-7. Contamination was found in the living room, the ventilation system filter, dining room as well as the bathroom, kitchen, and bedroom previously surveyed, tr 4747-8. Contaminated items were sealed in the 55-gallon barrels, tr 4742-4. [18]

As Karen sat outside the apartment as her belongings were being packed into barrels for disposal, she was approached by the Facility Manager, Morgan Moore, who described her as appearing shocked and hysterical and saying that she was dying, tr 7692. She was placed

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Footnote continued from preceding page

[15] Continued. experimental and only partially effective. See Add. 3.

[16] KM analogizes the Nov. 5 & 6 contaminations to other unexplained contaminations at the plant, (p.8), disregarding entirely the unmistakeable off-site Nov. 7 contamination and that the two earlier incidents derived from the same off-site source.

[17] KM was criticized by the AEC for its tardy response, Px 154, p.3, R.v. 13, tr 8218-20.

[18] Virtually all Ms Silkwood's personal possessions were seized and taken to the Cimarron Facility for disposal. See Px 6, R.v. 9, Px 126, R.v. 13, tr 7778. Her refrigerator, stove, t.v., sofa, carpeting were also removed, Dx 37, p.20, R.v. 18.

in a nearby automobile, questioned by a company lawyer, and required to sign a statement, tr 7693-4, Px 41, R. v. 9, Dx 81, R. v. 18. Mr. Moore asked Karen if she had brought any plutonium home, and she told him "no", tr 3753-4. KM did not provide alternate housing, Id., or medical attention, tr 7694, and Karen was observed standing on the street outside her apartment, crying, tr 1276, 3753-4.

She later phoned her mother, telling her that she had been contaminated and was coming home -- her mother described her as upset, nervous and crying. She asked if there wasn't something that could be done; Karen replied that there wasn't anything you could do for someone that received radiation, there was no cure, tr 4387.

Karen also called union representative Wodka that evening; she told him of her contamination and that she had a significant, maybe lethal, amount within her. She was quite distraught and worried about her health, had no idea whether she was going to live another day, and stated she was going to die several times. She noted that KM had not provided her with any medical attention -- only a KM lawyer who forced her into a car and demanded a statement, and that KM didn't care about her health. They were just trying to pin the blame on her. She asked Wodka to come to Oklahoma. Wodka told her to make herself unavailable to KM's lawyers since they were only trying to blame her and told her he would be in Oklahoma City the next day, tr 3735-42, tr 3798. Wodka called the AEC, demanding that it provide qualified medical care for Karen, tr 3740.

Events Following Contamination

Wodka arrived in Oklahoma City the morning of the 8th to find Karen Silkwood quite thin and pale with large circles and bags under her eyes; she seemed very depressed and quiet, tr 3742-3.

At approximately the same time, an investigation team from AEC regional headquarters and the AEC medical consultant arrived. Upon arrival, the AEC inspectors were told by KM officials that they suspected Karen Silkwood of deliberately contaminating herself to embarrass the company, tr 7589-90. A meeting between Wodka, Karen Silkwood and the AEC was arranged for the Holiday Inn, tr 3743.

While waiting for the meeting, Silkwood gave Wodka a note pad, ripped some notes out of another notebook, and told him to hold them for safekeeping. [19]

On the afternoon of the 8th, AEC investigators, Wodka and Silkwood met. The investigators discussed the events of the previous days with Ms. Silkwood, who was seriously upset, tr 6278-9. Silkwood and Ellis met with the AEC medical consultant and KM's medical consultant, Dr. Charles Sternhagen, on November 9, 1974. In a memorandum to his superior, Sternhagen reported that Silkwood and Ellis had been "handled in a way that both were quite near or in some sort of emotional breakdown", tr 7175-6; Ms. Silkwood had been crying; was aloof; uncommunicative; distraught; nervous; depressed; confused; shaking; clutching her hands together during the meeting, tr 7129-30, 7039. [20] It was decided that Ms. Silkwood

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[19] Px 276, R.v. 13 is the notebook; Px 275, contains the individual notes ripped out of it, tr 3745. The notes contained information documenting health and safety problems and possible AEC violations at KM's plant which Karen had been gathering by direction of the OCAW Union. See union background, supra. She specifically noted that the notes were not the KM incriminating documentation she had been collecting to reveal to N.Y. Times reporter Burnham; "I still have that." tr 3743.

[20] Karen was apprehensive and distrustful of Sternhagen -- KM's medical representative -- and felt he, like KM, was trying to minimize the harm to her and blame her, tr 3784-5.

would travel to Los Alamos Scientific Laboratory in New Mexico to undergo further tests as to her contamination, tr 3778. During this time, Karen called her sister, Rosemary, expressed her fears that she had no more than 5 years to live and said that she would be moving back to Texas on December 1, tr 4314.

Arriving in Los Alamos on November 10, 1974, Ms Silkwood underwent whole body and chest counting procedures. Dr. George Voelz of LASL discussed the results, minimizing the risk of harm, but noting that the lung counter could be off a factor of 3 to 5 times, tr 9337. In a private conference Karen requested, she asked Dr. Voelz and Dr. Sternhagan whether her exposure would affect her ability to have children and whether it was possible to do blood tests on the menstrual pads she had left with the lab, tr 9099-9100. Dr. Voelz told her that there would be no effect on her ability to have children and that there was no test that could be performed as she requested, tr 9100.

Karen Silkwood returned to Oklahoma City on November 12, 1974. When she reported to work on the 13th of November she was given a written work re-assignment, Px 291, R.v. 13 [21] which severely restricted her movement and required a constant escort, tr 7688-9, Px 291, R.v. 13. She participated in a union negotiating session that day that lasted until approximately 3:00 p.m., tr 7521. After the session Silkwood met with the AEC inspectors concerning her contamination at length, [22] and cried. She left at 5:00 p.m. to attend a

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[21] The area she was reassigned to was known as the "rockpile" and the reassignment was considered punitive, tr 7688-9.

[22] KM falsely claims (p. 16) that Karen refused to answer questions about the contaminated urine samples. AEC investigator Phillip testified that at that point in the interview she had to leave for her union

union strategy session, tr 6096-6101.

While at the union meeting at the Hub Cafe in Crescent, Ok., Karen spoke with Jean Jung and stated, with tears in her eyes, that she had enough plutonium inside her to kill her eventually, tr 3676,[23] and that she had her proof to give to Wodka and Burnham that night, tr 3693. She showed her a special notebook and brown manila folder, tr 3657, and said she had proof of falsification of records and samples of bad fuel welds which had been shipped, tr 3714-6. Earlier that evening Wodka and Burnham had arrived on Oklahoma City, checked into the Holiday Inn, and awaited Karen's arrival, tr 3848-9. Minutes after Karen Silkwood left the cafe at about 7:30 p.m. to meet Wodka and Burnham, she was killed in an auto accident.[24]

After her death, the AEC completed its investigation into the allegations submitted by Karen et. al on September 27 in D.C., and confirmed much of that information, Dx 38, R.v. 18, using the notes Karen left with Wodka for safeguarding on November 8. A special ERDA review team confirmed that photomicrographs of test welds on fuel rods had been touched up to obscure abnormalities or defects on the negatives in or near the critical weld areas, Dx 99, tr 7557-61, 7568-9, R.v. 18. In December, 1975, the plutonium facility closed.

Footnote continued from preceding page.

[22] con't. meeting, and agreed to resume the next morning. tr 6101

[23] Karen's anxiety and mental anguish were thus not halted by the reassurance of KM's medical consultants as KM claims, (p. 16); see also tr 4314 (Karen told her sister she was going to die "a few days before her death").

[24] To refute KM's argument that Karen had no documents which would embarrass KM (and, therefore, had to spike her urine kits to embarrass it), tr 9934, plaintiff made an offer to prove that these documents were subsequently removed by KM personnel, tr 9935-41. Upon KM's counsel's decision to forego further argument that Ms. Silkwood failed in her mission, the court refused the proffer, tr 10, 129.

STATEMENT OF THE CASE

Nature of the Case

This is a personal injury action brought by Bill M. Silkwood as Administrator of the Estate of his daughter, Karen G. Silkwood, who died on November 13, 1974. The Estate's sole beneficiaries are her three minor children. The defendants are Kerr McGee Corporation,[1] an Oklahoma-based energy conglomerate, and its wholly owned subsidiary,[2] Kerr McGee Nuclear Corporation. Jurisdiction was based on diversity of citizenship and the requisite amount in controversy under 28 U.S.C. §1332.[3] Recovery was sought for radioactive contamination damage to Ms. Silkwood's person and property on November 5, 6, & 7, 1974, and for the resultant mental anguish and emotional distress, caused by the escape of plutonium from KM's custody into Ms. Silkwood's apartment and body.

Plaintiff charged that the escape of the plutonium and the consequent foreseeable damages resulted from KM's negligence and that such negligence was part of a pattern of reckless, willful and wanton misconduct and disregard of plaintiff's rights, justifying punitive damages under 23 O.S. §9. There was evidence at trial

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[1] Hereafter cited as KMC, its nuclear subsidiary as KMNC, and the two collectively as KM. Throughout the brief, footnotes are numbered consecutively within each separate section.

[2] In post-trial motions and docketing statement KM challenged the jury's specific finding under Inst. 16 that KMNC was the mere instrumentality of KMC, reply to spec. interrog. No. 4, R. 844. There was ample evidentiary support, see e.g. tr 2494-2504, 2536-56. As this issue is not addressed in KM's brief, it is not discussed herein.

[3] Two counts of the original complaint involving different claims and defendants were dismissed before trial and are the subject of a different appeal, No. 79-1014.

that such legal malice was accompanied by actual malice toward Karen Silkwood specifically. Plaintiff also alleged that KM was strictly liable for the damages that had resulted from its "abnormally dangerous" activities.

KM's chief factual defense was that Ms. Silkwood had herself intentionally removed the plutonium from KM's facility and thereafter contaminated herself, intentionally or accidentally. KM also asserted various legal defenses including the assertion that the District Court's jurisdiction was preempted by Oklahoma's Workers' Compensation Act and by the AEC (now NRC) regulation having so occupied the field as to preclude tort recovery for damages under Oklahoma law.

At trial, the presiding judge ruled that KM's activity was, under the evidence, abnormally dangerous as a matter of law, submitting for the jury's determination the issues of whether KM's abnormally dangerous activities had caused injury to Ms. Silkwood and her property, whether KM breached its legal duty of utmost due care and whether such breach was the proximate cause of damage to Ms. Silkwood. The jury was asked to determine these issues as well as actual damages and punitive damages in the form of answers to special interrogatories. The jury found that Ms. Silkwood had not intentionally removed the plutonium herself, that KM had been grossly negligent and awarded $505,000 actual damages ($5,000 of which was the stipulated value of the contaminated property confiscated), and $10 million punitive damages.

In this appeal of the jury's verdict and the presiding judge's decision overruling its motions for judgment N.O.V. or for a new trial, KM claims the trial court abused its discretion in denying its post trial motions, and challenges the court's jurisdiction, the sufficiency of the evidence, various evidentiary and

Jury Finding of Reckless Disregard and Award of Punitive Damages

Oklahoma allows punitive damages to be imposed in cases where fraud, oppression, gross negligence, or malice are present, 23 O.S. § 9. In addition to liability from evidence of actual malice, where there is a reckless and wanton disregard of another's rights, malice and evil intent may be inferred, and punitive damages awarded. Misco Leasing, Inc. v. Keller, 490 F. 2d 545, 549 (10th Cir. 1974), White v. B.K. Trucking Co., Inc., 405 F. Supp. 1068, 1069 (W.D. Ok. 1975), Tomlinson v. Bailey, 289 P. 2d 384, 385 (Ok. 1954); Mayo Hotel Co. v. Danciger, 288 P. 309 (Ok. 1930).

Wanton conduct is conduct which exhibits a conscious indifference to consequences in circumstances where the probability of harm is reasonably apparent. Barall Food Stores, Inc. v. Bennett, 153 P. 2d 106, 110 (Ok. 1944), Foster v. Emery, 495 P. 2d 390, 392 (Ok. 1972).

Under Oklahoma law, it was proper to introduce evidence of KM's prior acts of misconduct and reckless disregard of the kind which allowed the escape of the dangerous plutonium and the consequent damages to Ms. Silkwood.

The Oklahoma Supreme Court has held:

> "Since evil intent (malice actual or presumed, is or may be an important factor in the awarding of exemplary damages; since such damages are awarded on the theory of punishment; and since when evil intent, actual or presumed, is a material element or issue in a case, similar prior acts may, with judicial approval, be admitted in evidence to establish such intent." Kurn v. Radencic, 141 P. 2d 580, 582 (Ok. 1943). See also, Pennsylvania Glass Sand Corp. of Oklahoma v. Orment, 434 P. 2d 893 (Ok. 1976); Sunray Dx Oil Co. v. Brown, 477 P. 2d 67 (Ok. 1970); Cates v. Darland, 537 P. 2d 336 (Ok. 1967); Misco Leasing Inc. v. Keller, supra; Edgar v. Fred Jones Lincoln Mercury of Oklahoma City, Inc., 524 P. 2d 162 (10th Cir. 1975).

The evidence compelled the jury's conclusion, under the court's proper statement of applicable law,[26] that KM had manifested with unmistakeable clarity its malice under the law -- its reckless disregard for the hazards of plutonium and for the rights of those endangered by its conduct - in particular the rights of Karen Silkwood.

Pattern of Conduct

KM's pattern of conduct, from the day the plutonium plant was initiated evidenced a total insensitivity to the extremely hazardous nature of plutonium and its activities and to the duty of utmost due care which the law imposed.

The evidence showed that the plant itself was poorly designed: it was cramped, tr 1146, Px 28, R. v. 11, instead of being welded, (cf tr 1142, 1163) rubber gaskets which leaked radiation were used, (tr 1141-2, 1161-3), despite the advice of a KM supervisor, tr 1141; overhead piping was poorly welded by unqualified welders, tr 2337-9; leak detection systems and alarms were not used, tr 1203, Px 28, pp. 36, 178 R. v. 11, gloveboxes, the most important containment for plutonium, were composed of poor materials and poorly designed, tr 1143-9, 2480-5; air monitoring systems to detect airborne plutonium were deficient and malfunctioned, tr 5569, 5689, 5699, 5703; Px 28 pp. 8-12, 25, R. v. 11.

A distressingly large number of contamination incidents occurred at the plant, many resulting from faulty equipment and processes and the inadequate training of workers. (See Px. 28, R. v. 11, tr 1145-6; 1189; 1262; 1464; 1787; 1796; 1841; 2288; 2296; 2340).

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[26] Inst. 10, 13, 15, 19, 20, 28, unchallenged by KM as to definition of malice.

Several specific incidents illustrate KM's reckless and callous disregard for the radiation hazards which it created for its workers and members of the public.

In March, 1973, a fire occurred which spread high levels of contamination. The AEC found that exposed workers were not wearing respirators during the waste removal procedure, as required by good practice, respirators were not readily available, and the air monitors paper had run out, so the contamination levels were not wholly known. Px 198-13, at 3, R. v. 13, Px 293, at 13-14, R. v. 13. The AEC concluded that KM's attitude about this serious incident "appeared casual", Px 198-13 at 4, R. v. 13.[27]

In another incident, improperly designed equipment twice expelled plutonium into a room, the second time seriously contaminating five people with almost 40,000 times the maximum permissible concentrations. Px 28, pp. 61-2, R. v. 11. KM was required to immediately notify the AEC, but the AEC was convinced that KM had deliberately delayed notification, tr 8200, Px 198-5, R.v. 13. The AEC noted that KM needed to be instructed that protection of people had priority over resumption of production, Px. 198-5, p. 12, R. v. 13.[28]

In 1972, two workers who had gone to breakfast in a public cafe were found to be contaminated when they returned to the plant. Px 28, pp. 102-4, R. v. 11.

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[27] After this incident, workers were made to work in respirators and the contamination was painted over.

[28] After the furor over Ms. Silkwood's contamination, KM prepared a multi-volume set of materials for public relations purposes. In vol. VII, the exposures in this incident were inexlicably reduced from 4906 MPC hours to 50, Px 261, R. v. 13, tr 5729, 8201

KM did not notify the AEC, as required, tr 8195,[29] and did not notify the restaurant or its patrons of the possible health hazard, or survey the restaurant.

KM's reckless disregard for the safety of the public was further illustrated in a series of incidents where it shipped plutonium wastes that were supposed to be solidified in liquid form, hence, prone to leak. Px 198-15, p. 3, Px 198-16, pp.3-5 , 16, 24, R. v. 13. Twice the mass liquified and contaminated the loading dock, Px 28, pp. 167-8, R. v. 11. This waste disposal problem existed since July, 1972, Px 198-16, p. 16, R. v. 13, and KM was notified that waste was arriving at the Kentucky burial site in liquid form on June, 1973, Px 198-16, p. 3-4, R. v. 13. KM was cited by the AEC for two specific shipments of waste which violated its license and 10 CFR Part 71 Px 198-16, p. 5, R. v. 13. Again, the AEC became aware of KM's cross-country shipment of defectively packaged waste only from a tip from a concerned citizen.[30]

Concealment of Cancer Risk

A willingness to expose workers to extreme hazards in a reckless, willful and wanton manner was well illustrated by KM's action with

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[29] The AEC found out about the incident 18 months later, only because of a tip from a concerned citizen who had heard of the incident from KM workers, tr 8195. Even at trial, the AEC had no idea as to the level of contamination that was in the public cafe. This episode gave the jury a glimpse of KM's indifferent attitude toward allowing dangerous radiation to escape into the public domain.

[30] KM persistently blamed its workers for problems which were its own doing, tr 7591-2, 7601-5. On one occasion, five workers were contaminated in two separate incidents 1-1/2 hours apart. KM claimed to the AEC and FBI (who were at the time investigating the contamination and death of Ms. Silkwood) that it was sabotage. Later investigation showed the cause to be a thermocouple that had never been properly connected, tr 7604, 1262-4.

regard to the risk of cancer associated with plutonium. The most significant health risk from plutonium was unquestionably the danger of lung cancer from inhalation, (tr 741-2) as KM management well knew, tr 747-50, 1730. KM's witnesses admitted that workers needed to be told about the cancer dangers, tr 9243, 5731. Plaintiff's experts stated that the cancer risk had to be clearly and emphatically communicated above all other dangers, e.g. tr 788.

The evidence clearly showed, however, that workers were not told that lung cancer was a risk, (see e.g. tr 1904, 2277, 2343).[31] The word cancer does not appear in any of the training materials used to purportedly communicate the risks to workers, see Dx 5, 6, 7, R. v. 18; tr 787, 1724, 8756. Such an omission would have to be contrived and planned, tr 1731.[32] In cross examination, the man who wrote KM's manuals in 1969 (Valentine) admitted that he had plagiarized the language from a 1959 article (px 283, R. v. 13,) but had excised the language from the article that most clearly communicated the cancer risk, tr 5813-9, Px 283, R. v. 13; Dx 5, 6, 7, R. v. 18.

The manuals instead stressed the "permissible" exposure, "acceptable" and "safe" exposure levels (e.g. Dx 5, R. v. tr 5711-3, 787-8, 791-2) and the especially misleading statement that there is no evidence of any plutonium induced cancer in humans.[33] KM's overall

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[31] One KM worker who testified learned of this danger for the first time from newspaper accounts of the trial, tr 1971.

[32] The manuals employed arcane jargon (tr 1114) which was incomprehensible to the young workers, many from rural backgrounds, who comprised KM's workforce at the plant, see e.g. 6525-7; 5736-7, 8685-94, 2289, 2471.

[33] Dx 5, R. v. 18, tr 5735-39. Plaintiff's experts had previously emphasized the misleading character of such a statement, 1679-83, 880-3, 792-5.

message to its workers was not that its plutonium activities were extremely hazardous and involved cancer dangers, but rather that KM's operation was no more risky than any other industry,[34] a gross deception, evidencing a callous disregard for the truth and for the safety of those naively endangered by KM's activities.[35]

In sum, the evidence provided a detailed portrait of KM's recklessness and its callous indifference to the hazards it created and the consequences to those it endangered. The evidence also revealed KM's recurrent proclivity to deceive - its workers, the AEC, the public, and the jury.

KM's attitudes and actions concerning the contamination of Ms. Silkwood were part of the pattern - the same recklessness, blame-shifting denial of responsibility and efforts to trivialize the harmful consequences of its actions and its true culpability.

KM's breach of its duty of care which permitted the escape of plutonium and the harm to Ms. Silkwood and her property and its less-than-diligent follow-up was more than severe enough to support an inference of legal malice under Oklahoma law. There was also evidence of evil motive, hostility, actual malice directed at Karen Silkwood, specifically.

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[34] KM's Board Chairman flatly told the workers that the nuclear industry was probably the "safest ever developed" and that KM's plant was safe, Px 16, R. v. 9. It is clear that the workers got this false message, see e.g. tr 2477.

[35] Dr. Morgan equated KM's actions to "inviting someone into a lion's cage without disclosing the presence of the lions", tr 1724. Luring workers into cancer dangers, for low wages (tr 3128) with false assurances of safety reflects an unconscionable and cruel recklessness and wantonness in relation to the terrifying cancer dangers issue. Given such deception by KM, it requires extraordinary audacity for KM to argue that its workers "assumed" the concealed risks

KM's tendency to shift the blame onto its workers was repeated with Karen Silkwood - she was immediately accused of contaminating herself, tr 3753-4, 7589-91, 3739, 6268 - originally of having deliberately eaten plutonium! Px 226, R. v. 13. KM's virulent anti-union posture[36] contributed to its callous treatment of Karen Silkwood - the belligerent assertion by the facility manager on the 6th that Karen Silkwood wasn't really injured, [37] the "treatment" by a lawyer instead of a doctor on the 7th, [38] pushing Karen Silkwood to undergo a treatment which was useless, [39] not promptly bringing its medical consultant on the scene,[40] putting her under guard at the plant on the "rockpile".[41] All of this evidence supported the jury's finding of actual malice. Judge Theis deemed the sum of the evidence ample to support a very large punitive award, Op. 591. The evidence before the jury and trial judge compelled an award of punitive damages.

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[36] e. g. Px 182, R. v. 13, 183, R. v. 13, 307, R. v. 13, tr 3127-8.

[37] Tr 7708-9.

[38] Tr 7693-4, Px 41, R. v. 9.

[39] Tr 4720-21, tr 826-7.

[40] Px 154, p. 2, R. v. 13, Dx 37, App. N. R.v. 18

[41] Px 291, R. v. 13.

VI. THE COURT'S RULINGS ON THE EFFECT OF KERR-McGEE'S PURPORTED "SUBSTANTIAL" COMPLIANCE WITH AEC REGULATIONS WERE CORRECT.

KM asserts that it "substantially" complied with AEC regulations and that such quasi-compliance should preclude findings of negligence, gross negligence and punitive damages.

The evidence was, however, that KM was not in compliance with but in violation of AEC regulations, in particular the germane regulations governing exposures of people to radiation. In addition, the law is that even if KM had fully complied with the AEC minimum standard regulations, such compliance would not preclude a finding that it was negligent.

KM Violated AEC Exposure Regulations

KM's "substantial" compliance assertion ignores the fact that evidence presented showed that KM had violated AEC regulations governing radiation exposures[1] in several respects.[2]

General Public Standards Violated

KM's claim that it complied with AEC exposure standards is in reference to the occupational exposure standards which were inapplicable to the exposure at issue here[3] which occurred in Ms. Silkwood's

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[1] KM's arguments as to the exposure standards and the fact of injury is addressed in Sec. IV supra. at p. 81.

[2] This Court must presume that the jury resolved conflicts in the evidence in our favor. Ahern v. V.A., 537 F. 2d 1098, 1100 (10th Cir. 1976).

[3] As Ms. Silkwood's off-site exposures did not occur in a restricted area, 10 CFR §§ 20.3(a)(14), nor did her contaminations occur, (even assuming arguendo, that she became contaminated when she spilled a urine sample), as part of her duties involving exposure to radiation, 10 CFR § 20.3(a)(10)(ii) thus her exposures did not constitute an occupational dose", 10 CFR § 20.3(a)(10) and the accumulated occupational dose limits were inapplicable, 10 CFR §§ 20.101(b)(2), 20.102(b), leaving the general public standards as the appropriate regulation.

apartment far away from KM's plant while she was off work. While Ms. Silkwood was off work and away from the place where KM was obliged to contain the radioactive plutonium, she was entitled to the same degree of protection against harmful exposures as any member of the public. The exposure standards for the general population are violated by exposures of only 1/10 the levels permitted for workers on the job - 4nCi to the whole body and 1.6nCi to the lung.

Ms. Silkwood's exposure - 10nCi whole body, 5nCi to the lungs by KM's numbers -- violated the general public standards by a factor of 2-1/2 times and 3 times (for whole body and lung respectively) as recognized by KM's own experts, tr 7196, 9406, and the court, Op. 583.

Occupational Standards Violated

Even if the AEC occupational exposure standards were deemed applicable, KM violated them as well. The AEC's occupational exposure recommendations are premised upon ICRP and NCRP recommendations based upon estimates of the dose delivered to the critical organs. As Dr. Karl Morgan noted, the lifetime exposure levels are calculated on the basis of the assumption that they would represent exposures accumulated over 50 years of work, tr 1638. As a corollary, the standards limit the annual dose to 2% (1/50) of the lifetime total or .8nCi to the whole body and .32nCi to the lung.[3] If an exposure exceeds these limits, the ICRP guidelines, and hence the AEC standards, have been broken, tr 1642-3. Dr. Morgan's highly qualified expert testimony was that the exposure which KM permitted Ms. Silkwood to receive substantially violated AEC regulations.[4] (tr 1584, 1648, 1737, Op. 586).

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[4] KM's Dr. Voelz agreed with this interpretation of the ICRP standard, tr 9401.

Thus, KM violated the AEC exposure standards even if its own numbers as to Ms. Silkwood's contamination levels were accepted by the jury. There was, however, evidence that the tests and measurements from which the numbers were derived - in-vivo counter and autopsy results were subject to considerable measurement errors[5] and that the actual contamination levels could have been,[6] in fact, much higher.

The data and the expert analysis presented to the jury permitted the inference that the level of plutonium contamination in the lung alone may have been as much as 27nCi, tr 9459, Px 216, pp. 14-16,R.v.13, rather than KM's 5nCi number -- considerably in violation of the broadest lung standard - the lifetime occupational lung standard of 16nCi.

Violation of As Low As Practicable Requirement

In addition to the numerical exposure standards, AEC regulations required KM to keep exposures minimized - As Low As Practicable (ALAP). This was analogous to the general duty of caution required of auto drivers in addition to compliance with posted speed limits. tr 8222 AEC Regional Director Keppler concluded with regard to KM's allowance of Ms. Silkwood's contamination, that KM had not been, in fact, dedicated to its duty to keep exposures ALAP, tr 8304, Px 154, p.2, R.v. 13. This was another KM duty of care under AEC regulation which was violated.

Pootnotes continued from preceding page.

[4] It should also be noted that Dr. Morgan who helped develop and did the original calculations for the exposure standards, now believes that based upon growing evidence of plutonium's carcinogenicity at lower exposure levels the standards as applied to plutonium need to be reduced by a factor of at least 240 times, tr 1727-8, 1750.

[5] The in-vivo counters have a measurement error of 300-500%, tr 9456, 9737. Large plutonium deposits in the body can escape detection, tr9535, 9153, 9147, 9263, 9328. The measurements depend upon extrapolations

General Lack of "Substantial" Compliance

As the court noted (Op. 586), whether KM had actually substantially" complied with AEC regulations was a fact question for the jury. The court so instructed the jury (Inst. 27) and KM has not challenged the court's definition of substantial compliance. The jury resolved this fact question against KM and there was ample evidence to support its liability conclusion. In addition to the numerous contamination incidents at the plant, Px 28, R. v. 11, passim, there was evidence that KM repeatedly violated AEC requirements with regard to inventory and accountability controls for the plutonium entrusted to it, physical security, KM's poor training, and its poor management.[7] AEC Regional Director Keppler expressed serious concerns about KM's poor inventory controls, its poor training, manpower turnovers, lack of supervision, lack of commitment to its ALAP duties, Px 154, R. v. 13, tr 8218-20. Keppler estimated that between 1970 and the closing of the plant in 1975 KM had violated AEC license or regulation requirements roughly 75 times, but had never been fined, tr 8176.[8]

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[5] Con'd. from Americium levels which are subject to separate measurement errors estimated at 50% to 300%, tr 9456-7. The autopsy numbers derived from extrapolations from fractional samples of organs, tr 9134, Dx 45, Table 4.1, R. v. 18. Although available, the entire lung and many other organs were not analyzed, tr 9643-4, 9496-8, Px 216, pp. 14-16, R. v. 13.

[6] There was a clash in the testimony of KM's Sternhagen, tr 7078, Voelz, 9575-8, and our expert, Martell, tr 1036, 1033-4.

[7] These failings have been detailed in the discussion of the evidence of KM's negligence and gross negligence, supra, pp52 to 70.

[8] In a meeting with KM management after Ms. Silkwood's contamination. Keppler criticized KM for its tardy notification to the AEC, the delay between discovery of the contamination and the survey of her apartment, the inordinate delay in obtaining bioassay results and the lack of a whole body counter at the facility, tr 8214-5. An AEC consultant had complained of the absence of a whole body counter 17 months earlier, Px 293, R. v. 13.

In view of the evidence of KM's non-compliance, KM's propositions which are predicated on substantial compliance must be disregarded, Superior Ins. Co. v. Miller, 208 F. 2d 700 (10th Cir. 1953). Even if KM had fully complied with AEC requirements, that fact would not preclude a finding of negligence.

Compliance Does Not Preclude Negligence Finding

Compliance with statutory or administrative requirements does not preclude a finding of negligence, but is merely evidence of use of due care. Transport Indemnity Company v. Page, 406 P. 2d 980, (Ok. 1965), McBroom v. Mayer, 303 P. 2d 303 (Ok. 1956), Kansas O & G Ry. Co. v. Clark, 262 P. 426 (Ok. 1903).[9] RESTATEMENT, § 288C, PROSSER, § 36 at 203.[10] KM's argument that compliance is conclusive of due care is clearly contrary to Oklahoma law. This is particularly so because the AEC requirements were explicitly recognized by the AEC itself as minimum standards, tr 8152, 8221-2, 8245.

KM and Amicus fail to provide persuasive authority for the Court to abandon this well established rule of law. As noted by the court, (Op. 579-8), STASON, ESTEP & PIERCE concur with the applicability of this general rule to the operators of nuclear facilities. KM's sole

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[9] See also Nader v. Allegheny Airlines, 426 U.S. at 308 n. 19, (mere compliance with CAB regulations no bar to liability in common law fraudulent misrepresentation action).

[10] Amicus, (16-17), quotes PROSSER from the same page, omitting his following comment that: "But if there are unusual circumstances or increased danger beyond the minimum which the statute was designed to protect, it may be found that there is negligence in not doing more." (p. 204).

citation is to Heck v. Beryllium Corp., 226 A. 2d 87 (Pa. 1966)[11] which clearly falls within the line of Oklahoma cases, the RESTATEMENT and PROSSER.

Amicus is palpably in error when it argues that the AEC regulations define the full duty of KM since the contamination of Karen Silkwood was "precisely of the type contemplated by the regulations." (p.17) This assertion is directly contradicted by competent evidence before the jury, and was carefully examined by the trial judge before overruling KM's post-trial motions.

Amicus has advanced no persuasive authority why the widely recognized tort rule expressed by Oklahoma cases, the RESTATEMENT, PROSSER and other authorities should be discarded solely for the nuclear industry. This rule has been uniformly applied to products and activities of defendants in a wide variety of federally-regulated enterprises[12] - nothing in the AEC regulations and interpretations, Congressional legislative history, scholarly opinion or case law supports the extreme and unprecedented position espoused.

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[11] Had defendant there known then that its beryllium emissions were harmful ("where a reasonable man would take additional precautions") mere compliance would have been insufficient.

[12] See discussion of the "substantial" compliance argument in Sec. II, supra, at notes 15-22 and accompanying text.

APPENDIX
Volume IV

In the
UNITED STATES COURT OF APPEALS
For the Tenth Circuit

No. 79-1894

BILL M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, deceased,

Appellee,

v.

KERR-McGEE CORPORATION, a Delaware corporation, and KERR-McGEE NUCLEAR CORPORATION, a Delaware corporation,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

November, 1980

THE JOURNAL RECORD PUBLISHING CO., 401 N. ROBINSON, OKLAHOMA CITY, PH. 235-3100

was the autopsy information, which indicated no evidence of cancer under the microscope, which is the usual way by which we identify the presence of cancer. There were other pieces of information, including the level of exposure, which is comparable to a group of patients that have been followed by other investigators in terms of plutonium exposure, the fact that they had not developed cancer at similar dose levels. And the fact that exposure to carcinogenic agents does not necessarily mean that a particular damage to cell will result in a cancer cell, because we know, for instance, that ultraviolet light is very carcinogenic, yet every woman that goes out for a suntan doesn't get skin cancer. So that there is a statistical chance of developing cancer based on the damage that is done by any carcinogenic agent. And that was the basis for my testimony.

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[8152]

JAMES KEPPLER DIRECT EXAMINATION

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Q. Before I further pursue these written reports, I would like to ak you another qestion about the nature of the inspection. Do your inspectors, your staff, do they limit their investigation and their inspection only to items that are listed in the license, that is, license conditions, and only to items in the regulations?

A. No, The framework of the inspection program is largely built around the regulations, but I think that – our experience is that it is not equating compliance to safety – it is not a 100 percent guarantee, if you will. Our experience is that licenses are deficient in certain areas. It is very hard to foresee all the conditions that may exist that you might want a license condition to touch on. What we try to do is – our pec-

ple are very experienced – they have generally a pretty broad background in the industry – and we look for them to go out an visually eyeball the facility, observe work in progress, to see if there are conditions that exist that they feel should be corrected and dealt with. If there are, we bring these to the licensee's attention, and usually try to resolve a course of action on it. If we feel strong about the issue, we'll bring the matter to the attention of this licensing and get a license condition put on it, if that is necessary.

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[8170]

JAMES KEPPLER CROSS EXAMINATION

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Q. What other things did you do – I mean, what other areas of regulation did you undertake at that time, besides the existing power facilities of a dozen or more, 24 in construction. The Kerr-McGee facility. What else?

A. We had about 3,000 by-product materials, licenses to inspect, and we had a number of roughly 15, what we call

[8171]

"research and training-type reactors" at universities, and so forth.

Q. Would if be fair to say – What was that last statement? Fifteen what?

A. Research and training-type reactors at universities.

Q. All over, or just in your area?

A. Just in my area.

Q. Would it be fair to say that in the years 1973 and 1974 you were indeed a busy young man?

A. I think so.

Q. And you not only were a busy young man, but had the huge, almost gargantuan, unbelievable responsi-

bility of the safety of the public in your area, did you not?

A. I wasn't doing it myself, sir.

Q. I understand, but you were the top dog?

A. Yes, sir.

Q. Strike the word "dog." You were the top puppy.

MR. PAUL: Well, your Honor, –

MR. SPENCE: Strike "puppy."

Q. (By Mr. Spence) You were the top man.

MR. PAUL: He is not a puppy.

A. I was the top man; yes sir.

MR. SPENCE: Thank you very much.

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[8176]

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Q. Now, can you tell the ladies and gentlemen of the jury the number of citations – citations – that were issued against Kerr-McGee from the commencement of this operation until its conclusion?

A. I can not tell them exactly; no.

Q. Did you review the files so that you could get a general oversight of the operation of this company prior to the time that you came to testify?

A. Yes.

Q. Can you give me an approximation of the number of citations that Kerr-McGee was issued during the period of 1970 until it closed its plant in 1975?

A. By guess the number would be somewhere in the vicinity of 75.

Q. Seventy-five violations. Now, a citation means that you – Let's talk about what a citation is. A citation is something that says you have violated a regulation, isn't it?

A. Yes.

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[8179]

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Q. (By Mr. Spence) Now, the problem, of course, that existed all during the period of this plant up until the time of and through and including Karen Silkwood's death, was that this was being regulated – and that is atomic energy, nuclear energy, the use of nuclear materials – were being both promoted and regulated by a single agency; namely the AEC, isn't that true?

A. That is true.

Q. And so here was the agency sort of in conflict with itself. On the one side it was attempting to promote nuclear energy, and on the other side it was trying to regulate and to negatively criticize and to lean on and to control the people that were trying to promote, and that caused problems, didn't it?

A. Yes, sir.

Q. And it has been referred to as the "fox and the chicken house syndrome," or the syndrome of "Dracula in charge of the blood bank," –

MR. PAUL: Well, your Honor, now this is –

THE COURT: Well, sustained.

MR. PAUL: – most improper, and I object to it.

THE COURT: I think those are arguments –

MR. PAUL: I ask that you admonish counsel about making such references.

MR. SPENCE: Well, I withdraw "Dracula." We have talked about the "fox" many times.

[8180]

THE COURT: Well, I understand, and I think the least appellations that are given – because – if there is something in common parlance, that's fine – I think "fox and the chickens" is widely understood, but the use of appellations, I think is –

Q. (By Mr. Spence) All right. So, now, relative to

the fox and the chicken syndrome, which is in general use – which the Court and I feel more comfortable with –

MR. PAUL: Well, your Honor, didn't you just tell him not to do that?

MR. SPENCE: I thought you said it was in general use, judge.

THE COURT: Well, I said it was in more general use, but any appellation is improper. I don't want to rob you of your style, but that is your appellation to it – not the witness'.

MR. SPENCE: All right, judge.

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[8184]

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A. The inspection, after the Silkwood contamination incident, consisted of some of the same inspectors, and some different inspectors.

Q. I said that they stayed at a different motel, didn't they?

A. We were instructed to stay at different motels.

Q. And who instructed you to do that?

A. Our headquarters.

Q. Who was that?

A. Mr. John Davis.

Q. And Mr. Shelley was – was it Shelley – no, it was Mr. Moore – Mr. Moore, Morgan Moore, late last week said that he felt that from his standpoint almost all, at least almost all of your inspections were unannounced – to him they were announced. Do you agree with that?

A. I think the majority of the inspections were unannounced; yes.

Q. Well, if the majority of the – And, so what you're saying is that the general inspections, where you came in to check the safety of the plant, were un-

announced. The other kind of situations were where you came in and sat down with Mr. McGee, or other officials, to discuss matters, isn't that true?

A. Or there may be some specific reasons to want to observe

[8185]

a test, or –

Q. For which you would ask them to set it up so you could see it?

A. That is correct.

Q. One of those would be to observe the test where they were testing the hole-up in the pipes – that would be an example?

A. An example; yes.

Q. But the rest of them, the basic inspections out there, were unannounced, weren't they?

A. Yes, sir.

Q. Now, if it appears from the testimony, from the preponderance of the evidence in this case, that even the people in management believed that most of the inspections were announced, would that cause you to be concerned about whether or not people in Kerr-McGee were being tipped-off?

MR. PAUL: Just a moment, Mr. Keppler. I object to the form of the question. There is no such evidence in this record.

MR. SPENCE: I believe that witness-after-witness – it has been brought out here under the direct examinations of Mr. Paul – has talked about the majority of those inspections being known to them and announced inspections.

[8186]

MR. PAUL: That is just not true, your Honor.

MR. SPENCE: That is the way I heard the testimony.

MR. PAUL: No, your Honor.

THE COURT: I think there's a big debate on that. It is my recollection that it is somewhat different. You may – you have had some admissions – you had your plant people that indicated there was none, but most of them indicated they didn't have knowledge they were coming, I think.

MR. PAUL: That is correct.

MR. SPENCE: Mr. Smith testified, I believe, that all of them were known. And witness-after-witness, who has taken the stand in management –

THE COURT: You're debating the evidence.

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[8187]

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Q. (By Mr. Spence) Aren't you aware of the fact, Mr. Keppler, Do you know Mr. Pittman?

A. Who?

Q. Mr. Frank Pittman, in the AEC?

A. No, I don't.

Q. I take it, then that you are not aware of his relationship with Kerr-McGee?

A. I am not.

[8188]

Q. Are you aware of what is known as the "revolving-door syndrome"?

A. No.

MR. PAUL: Well, you Honor, object to the –

MR. SPENCE: He says he's not aware of it.

MR. PAUL: Well, I object.

THE COURT: Sustained. Again those are –

Q. (By Mr. Spence) Are you aware of the in-and-out syndrome of government where people work in government and then come out of government?

THE COURT: That is better.

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[8195]

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Q. Do you think they should have reported it when there is a restaurant involved?

A. I think that in my judgment the matter should have been reported, but there was not a regulatory requirement at that time.

Q. So you're saying that – Is there now?

A. I don't think there is now, either, under the circumstances but again my comment would stand – we would have expected to have been informed of any contamination out in the public domain.

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[8199]

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Q. To put it in perspective, then you're saying that by the time you took over you felt that there had been enough going on in this Kerr-McGee facility that somehow the matter should have been dealt with more severely and directly before you got there?

A. I think that is correct.

Q. Now that the jury can understand your grade – which by the way this is a grade of "C", isn't it – you gave for Kerr-McGee about a "C" in this area?

A. That would be my personal assessment of it; yes. We don't have a formalized grading system, but that would be the way I would have graded them.

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Q. (By Mr. Spence) But, in 1971, your report states – and by "your" I don't mean you directly – but the AEC – that's your outfit?

[8214]

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Q. Yes. There was a meeting that occurred that is a part of the same report in which you do appear, isn't that true?

A. Yes.

Q. And there were a number of items discussed, weren't there?

A. There were basically three meetings; yes.

Q. And among the items discussed were these – let's just read them together: One, there was criticisms about the notification and availability of the company's medical expert. That is a criticism that you levied, isn't it?

A. These are criticisms we levied; yes.

Q. There were six hours between the finding of contamination on Ms. Silkwood and the initial survey of her apartment?

A. That was a concern.

Q. There was an inordinate delay getting bioassay results from U.S. Testing.

A. That is correct.

Q. "Inordinate" means way to long, doesn't it?

A. Much longer than we thought should be.

Q. "Facilities are not available for prompt whole body counting." Did you think that should be?

A. Yes, we did.

[8215]

Q. Why do you think facilities for whole body counting should have been at the Kerr-McGee facility?

A. Because it was our view that for an operation of this type, involving plutonium, that one should be there.

Q. For the health and safety of the workers?

A. Yes.

Q. And the incident clearly indicates that small, but biologically significant, quantities of plutonium can get out of the plant. Isn't that true?

A. That is correct.

Q. And a "biologically significant amount of plutonium" would be the amount of plutonium that could cause any single human being to get his full body burden in one dose, wouldn't that be true?

A. Well, –

Q. For example, do you think 5/10ths of a gram is biologically significant?

A. I don't know that.

MR. PAUL: Your Honor, I object to opening up this line. It is beyond the scope.

THE COURT: He said he didn't know, so that forecloses him.

Q. (By Mr. Spence) Anyway, those were criticisms that were made to Mr. McGee, weren't they?

A. And to his staff.

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[8218]

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Q. That is what the statement says, isn't it?

A. My statement to Mr. McGee was that based on the events that were happening at the plant that it was apparent to me that I could see no evidence that Kerr-McGee management was on top of the operation.

Q. Yes. And then you said you were very concerned that Kerr-McGee management are not committed to ALAP – What is that?

A. "As low as practical."

Q. – on exposures, and have not replaced profes-

sional health physicists lost several years ago. You said that, didn't you?

A. That is correct.

Q. And contamination incidents get short shrift if no limits are exceeded, don't they?

A. That is correct.

Q. Then you stated to Mr. McGee that the equipment used in the plant is archaic, and prone to break down, didn't you?

A. I said that.

Q. Or enhance contamination problems, for example in the slot boxes?

A. I made that statement.

Q. Yes. And you stated that the large number of procedural

[8219]

errors is the result of one of more of the following: First, personnel turnover, isn't that right?

A. A list of personnel turnover, training –

Q. Inadequate – Wait a minute. Let's not skip through it. What kind of training?

A. Inadequate.

Q. Inadequate training. And, what kind of supervision?

A. Or lack of supervision.

Q. Lack of supervision. And then you said the Pu hold-up problem – That is the matter of the plutonium in the pipes, wasn't it?

A. That is correct.

Q. – has not received attention from the proper level of Kerr-McGee management, is that right?

A. Yes.

Q. What level should that receive attention from, in your judgment?

A. The coporate management, without the finding

of the level – I think somebody in a decision-making process should have been on top of that.

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[8220]

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Q. (By Mr. Spence) I want to talk about this word "ALAP". I don't believe the jury has heard about it yet. What does that stand for?

A. As low as practical.

Q. As low as practical. What does it refer to?

A. Personal exposures.

Q. Of who – of people working at the plant?

A. Yes.

Q. Human beings there?

A. Yes.

Q. Would you tell me whether or not it is your position at the AEC that that is the ultimate standard that must be applied to every facility?

A. The problem, Mr. Spence, is that that was established as a regulatory objective, without any teeth.

Q. That is right.

A. It was a regulatory guide that all utilities, or all

[8221]

licensees, should attempt to keep exposures as low as practical without –

Q. Should?

A. Should.

Q. Should attempt?

A. Without defining what that means.

Q. All right. So what you're saying is – and let's make this clear so that the ladies and gentlemen of the jury can clearly understand it – when we talk about "permissible levels of exposure," that is one thing – that is a minimum standard, is it not?

A. The regulations contain requirements which licensees must adhere to.

Q. Yes.

A. Those are the maximum permissible levels of radiation.

Q. That is as far as they can go.

A. That is correct.

Q. That doesn't mean that you don't want them to try to get under that "as low as practical," isn't that true?

A. That is correct.

Q. And so you leave that to the judgment, sometimes, of the licensee – if he thinks the situation calls for more care, you expect him to use more care, don't you?

A. Yes.

Q. And so when we talk about standards, those are minimum

[8222]

standards that everybody must adhere to – they do not reflect the most care that should be given, but the minimum care that should be given, isn't that true?

A. Yes.

Q. And, again, to make that clearly understood, it is again like driving through a school zone, the minimum standard of which is a 20-mile an hour zone, but if it is slippery, and wet, icy, and there are a lot of kids, they might have to drive slower – that is what we're talking about, isn't it?

A. Basically; yes.

Q. Thank you. And that is what "as low as practical" means – as we have discussed it.

A. Yes.

* * * * * * * * * * *

[8224]

Q. Now, when we are talking about the use of plu-

tonium – and Kerr-McGee was using plutonium, were they not?

A. Yes.

Q. – we're talking about the use of the most dangerous element known to man, are we not?

A. I don't know the answer to that question.

Q. Well, it is because I used the word "most," isn't it?

A. Yes. It is a highly toxicant and dangerous material.

Q. You know it is – Would it be fair to say that it is frightenly toxic – that small amount, evenly distributed, as low as half a gram, that much (indicating), half a gram, could, if evenly distributed, give the maximum lung burden to millions of people – that is why we are concerned about it, isn't it?

A. Yes.

Q. And if we're talking about a pound of it evenly distributed, it could give the maximum lung burden to practically the whole world and so –

MR. PAUL: Your Honor, I object to this line of interrogation. It is highly speculative and –

MR. SPENCE: It is illustrative.

MR. PAUL: The "evenly distributed" part is nonreality, and it is just an improper line.

THE COURT: Well, after you have gone into it – it is toxic – I think the amounts – I will sustain

[8225]

the objection. We heard the witness yesterday – but then we've heard from some of the plaintiff's witnesses – so they're not – the jury is familiar with it, to begin with.

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[8228]

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Q. I think you have been misled. The evidence in

this case is undisputed that the only certified HP was Mr. Valentine.

Now, I like you to help me find the evidence that you just mentioned, because that will be interesting to me. Where could I look for that?

A. It seemed to me that that evidence was provided in response to a question by Mr. Stockton of the Dingell Committee.

Q. Who would have provided that information?

A. I think my staff did.

Q. So who would have given it to your staff?

A. I believe that is information that they obtained through a review of the files of Kerr-McGee, or a review of the records of the employment of Kerr-McGee.

MR. SPENCE: Now, I don't think there is the slightest question but what I said is true, and I'm going to just now ask you if there is any question about that, Mr. Paul.

MR. PAUL: Well, I think the question has to do with definitions, and I believe I can clear it up for you, but we must go the bench.

MR. SPENCE: All right.

[8229]

(At the bench.)

MR. PAUL: Based on my interview with the witness, your Honor, I would say that his reference is to the Health Physics Society, and active membership in the Health Physics Society, and that he's answering the question based on that information –

THE COURT: I see.

MR. SPENCE: Okay. I understand.

MR. PAUL: I think that's the problem.

(In open court.)

Q. (By Mr. Spencer) Don't you know the difference between somebody who is a member of the Health Physics Society and a Certified Health Physicists?

A. I guess I don't.

Q. Somebody who is a member of the Health Physics Society just has to pay a $3 dues, whereas somebody who is a Certified Health Physicists is somebody who is certified by a Board, and takes a test.?

MR. PAUL: Well, your Honor, I object to the form of that question. There has been no evidence to that effect.

THE COURT: Well, I will sustain the objection. I don't know as anybody has said there was a $3 dues. We know what a Certified Health Physicists is, but we

[8230]

don't know what the corollary is.

Q. (By Mr. Spence) Weren't you aware of the fact that the only certified health physicists in the plant was Mr. Valentine, who left if 1972 – didn't you know that until I just told you that now?

A. No.

Q. And you didn't know, until I just told you, the difference between somebody who is merely a member of a society – like Mr. Norwood was a member of the Health Physics Society, and gets the monthly publication, and that sort of thing – and somebody who has been tested and certified to on the other hand – you didn't know that difference?

A. I wasn't involved to that degree.

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[8245]

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Q. And when you find a plant where workers are not cooperative, or seem to be unconcerned about their health, that may indicate they are not getting the correct training, isn't that true?

A. That may be a symptom; yes.

Q. And that was one of the things you were reporting directly to Mr. McGee, wasn't it?

A. It was one of the issues I expressed concern about.

Q. Thank you. Now, I hear you accurately – I wrote it down – but I want to make sure – that when you say that – when you say that compliance with the conditions of the license by the licensee is no guarantee of safety – you did say that?

A. That is correct.

Q. The other side of that is also true, is it not, that when you see violations of the license, it may be evidence of an hazardous operation?

A. It could be.

* * * * * * * * * * *

JAMES KEPPLER RECROSS EXAMINATION

[8304]

Q. Okay. Now, that is the meeting that Mr. Paul was talking to you about on redirect a few minutes ago and asked you whether or not Kerr-McGee agreed with that – these conclusions – about all of their failures, all of the problems, all of the objections that you have made, and which we have gone over with the jury over-and-over again, and what is the comment at the bottom that Mr. Paul did not read to the jury?

A. (Reading) "The Kerr-McGee representatives expressed no disagreement with any of the material presented."

Q. And the people that you are referring to that say that "Kerr-McGee representatives expressed no disagreement with any of the material presented," were the people you have just mentioned, who have testified before the jury; Mr. Zitting, Mr. Dunn, Mr. Moore, Mr. D.A. McGee, is that correct?

A. Yes. Could I make a comment?

Q. Yes, of course.

A. I think the impression that I had during the meeting – there were no comments made on anything – I think the position being taken by the company at that time was to hear the findings presented. They commented on nothing in either of the two meetings.

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No. 81-2159

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

BILL M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, Deceased,

Appellant,

v.

KERR-MCGEE CORPORATION, a Delaware Corporation and KERR-MCGEE NUCLEAR CORPORATION, a Delaware Corporation,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE STATE OF MINNESOTA AS AMICUS CURIAE

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

BILL M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, Deceased,

Appellant,

v.

KERR-MCGEE CORPORATION, a Delaware Corporation and KERR-MCGEE NUCLEAR CORPORATION, a Delaware Corporation,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE STATE OF MINNESOTA AS AMICUS CURIAE

I. STATEMENT OF INTEREST OF MINNESOTA

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, the State of Minnesota (hereinafter "Minnesota") by its Attorney General hereby files its brief as amicus curiae in the above-entitled matter.

Minnesota has an interest in the preemption issue raised in this litigation by the holding of the United States Court of Appeals for the Tenth Circuit that Oklahoma's punitive damages statute is preempted by federal congressional action and therefore unconstitutional under the Supremacy Clause of the United States Constitution.

Minnesota's interest arises from the fact that it has a statute which allows Minnesota courts to award punitive damages in civil actions where the court has found that the defendant's acts show a willful indifference to the rights or safety of others. Minn. Stat. §549.20, subd. 1 (1980) provides:

> Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others.

Subdivision 3 of the statute sets forth the factors to be considered by the court in such an award. That subdivision states:

> Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

Minnesota's statute was enacted in 1978. It sets forth standards for the award of punitive damages which parallel those of the common law. Minnesota-Iowa Television Company v. Watonwan T.V. Improvement

Association, 294 N.W.2d 297, 311 (Minn. 1980). It has been held that this statute does not apply to contract actions (id.), but it presumably applies to all tort actions.

The court of appeals' extremely broad interpretation of the doctrine of preemption, if upheld by this Court, would create a precedent which would have a negative impact upon Minnesota if in the future a challenge were brought against Minn. Stat. §549.20 (1980) in a case where the tort involves a radiation injury rather than any other type of injury. Thus, Minnesota has an interest in the precedent this Court's decision in this case may establish with respect to the validity of Minn. Stat. §549.20 as applied in certain tort cases.

Minnesota also has an historical interest in the issue of preemption of state

laws as they relate to nuclear power. Minnesota was a party in the case of Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972), upon which the court of appeals relied in striking down the application of Oklahoma's punitive damages in this case. Minnesota's concern with nuclear power dates back to the late 1960's and has continued up to the present.

II. STATEMENT OF THE CASE

The statement of the case which follows sets forth only those facts which are relevant to the issue addressed by Minnesota in the remainder of this brief.

Plaintiff Bill M. Silkwood brought suit in federal district court against Kerr-McGee Corporation and Kerr-McGee Nuclear Corporation on behalf of the estate of Karen G. Silkwood for damages caused through exposure to radiation suffered by

the decedent as a consequence of plutonium escaping a nuclear fuel processing plant operated by defendants. Following the jury trial, the district court awarded to plaintiff actual damages in the amount of $505,000. Pursuant to 23 Okla. Stat. §9 (1971), the district court also awarded punitive damages in the amount of $10,000,000. 1/

On appeal the Court of Appeals for the Tenth Circuit reversed the district court on its award of punitive damages. Silkwood v. Kerr-McGee Corp., 667 F.2d 908 (10th Cir. 1981). The court examined the language and the legislative history of the Price-Anderson Act, 71 Stat. 576 (codified in scattered sections of 42 U.S.C.) and concluded that, for nuclear incidents below

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1/ The opinion of the district court denying defendant's post-trial motions is reported in Silkwood v. Kerr-McGee Corp., 485 F.Supp. 566 (W.D. Okla. 1979).

the level of an extraordinary nuclear occurrence, Congress intended that the rules of tort law of the state in which the injury occurred still apply. 667 F.2d at 921. The court, however, found no express mention of punitive damages in the Price-Anderson Act or its legislative history. The court stated:

> References in the Price-Anderson Act that state law may determine tort liability may be read to permit punitive as well as compensatory damages in states like Oklahoma which permit them.

667 F.2d at 922. The court also found, however, that the Act implicitly assumes that for extraordinary nuclear occurrences, only compensatory damages will be awarded. Id. The court apparently found the result in this case unclear under the Act because it made no conclusion as to whether the Act did or did not allow punitive damages to be awarded under state tort law.

The court resolved the doubt created by the Price-Anderson Act by construing the Atomic Energy Act of 1954, 42 U.S.C. §§2011 et seq., particularly section 2021, as preempting a judicial award of punitive damages under state law as punishment for bad practices or to deter future practices involving exposure to radiation. The court stated:

> We cannot read that case [Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972)] and Train [Train v. Colorado Public Interest Research Group, 426 U.S. 1 (1976)] other than as requiring us to hold invalid any state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material.

667 F.2d at 923. The court found the punitive damages award to be "no less intrusive than direct legislative acts of the state." It held 23 Okla. §9 (1971) to be preempted as applied to radiation injuries.

The appellants seek the Court's review of this case and reversal of the Tenth Circuit's holding that Oklahoma's punitive damages is preempted under the Supremacy Clause of the United States Constitution.

IV. SUMMARY OF ARGUMENT

A state's interest in fashioning its own tort remedies is paramount to any federal interest unless there is a conflict with federal law. State punitive damages statutes as applied to tort actions involving radiation injuries do not conflict with federal law and are therefore not preempted as applied to such tort actions.

V. ARGUMENT

STATE PUNITIVE DAMAGES LAWS ARE NOT FEDERALLY PREEMPTED AS APPLIED TO TORT ACTIONS BROUGHT FOR RADIATION INJURIES

The creation of remedies for tort actions is a traditional state power. This Court has recently recognized that a state's interest in fashioning its own

tort laws is paramount to any federal interest unless there is a conflict with federal law. In Martinez v. California, 444 U.S. 277 (1980) the Court upheld against constitutional attack a California statute which provided an immunity defense to potential state tort law liability, stating:

> Even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any federal interest, except perhaps an interest in protecting the individual from state action that is wholly arbitrary or irrational.

444 U.S. at 282. The court noted, however, that "when state law creates a cause of action, the State is free to define the defenses to that claim, . . . unless, of course, the state rule is in conflict with federal law." Id., n.5, quoting Ferri v. Ackerman, 444 U.S. 193, 198 (1979).

Punitive damages laws of Oklahoma and other states do not conflict with federal

law and are therefore valid. The court of appeals applied an incorrect standard to invalidate the Oklahoma statute. Therefore this Court should reverse the decision below.

A. There is No Conflict Between Federal Law and the Application of State Punitive Damages Law to a Case Involving Radiation Injury.

This Court has in the past faced the question as to what constitutes a conflict between federal and state law. The conflict may either be created by express language in the federal law or may arise by implication. See Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978).

In cases where there is no express language in the federal law the Court has used two tests to identify conflicts. In Florida Lime and Avocado Growers v. Paul, 373 U.S. 132, 142-43 (1963) the Court stated that a conflict will be found "where

compliance with both federal and state regulations is a physical impossibility." A conflict will similarly be found where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). However, there is a strong presumption in favor of upholding the validity of the state law. Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978). Courts should not seek out conflicts where they do not clearly exist. Huron v. Portland Cement Co. v. City of Detroit, 362 U.S. 440, 446 (1960).

The two bodies of law with which a state punitive damages statute could conceivably conflict are the Price-Anderson Act, 71 Stat. 576 (codified in scattered sections of 42 U.S.C.) and the Atomic Energy Act, 42 U.S.C. §§2011 et seq. The Oklahoma statute conflicts with neither of these.

As previously discussed at 6-7, the court of appeals concedes that for nuclear injuries below the level of an extraordinary nuclear occurrence the Price-Anderson Act provides that state tort rules apply. The court of appeals also concedes that references in the Act itself may be read to permit punitive damages as well as compensatory damages. Therefore there is clearly no conflict between the Price-Anderson Act and state punitive damages statute.

The Atomic Energy Act, 42 U.S.C. §2011 et seq., contains no express language under which state punitive damages laws conflict because the Act contains no provision for awards of damages to private individuals, either compensatory or punitive. See Marshall v. Consumers Power Co., 65 Mich. App. 237, 237 N.W. 2d 266 (1975). The Act and its legislative history contain no

evidence of a direct intention of Congress to preempt any part of state tort law with respect to radiation injuries.

State punitive damages laws also fail to conflict with federal law because they do not create a situation where compliance with both federal and state law is a physical impossibility. Further, such laws do not stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress.

Compliance with federal law by a person handling radioactive materials is clearly possible without automatically creating liability under a state punitive damages law. In Minnesota, for example, punitive damages may only be awarded where there is "clear and convincing evidence that the acts of the defendant show a willful indifference to the rights of others." Minn. Stat. §549.20 (1980). The Oklahoma

law in question permits the award of punitive damages where fraud, oppression, gross negligence or malice are present or where there is a reckless, willful or wanton disregard for the rights of others. See, e.g., White B. K. Trucking Co., Inc., 405 F.Supp. 1068-69 (W.D. Okla. 1975). There could be no conflict with the Atomic Energy Act and the regulations promulgated thereunder unless it could be shown that Congress intended to compel persons handling radioactive materials to do so in a manner showing a willful or wanton indifference to the rights of others or in a manner that is fraudulent, oppressive, grossly negligent, malicious or reckless. Not even the most enthusiastic proponents of nuclear power would dare to make a claim that such a result is intended by Congress.

The imposition of liability for punitive damages on a defendant who meets

the standards described above does not stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. The Atomic Energy Act sets up the structure under which private industry may possess and use radioactive materials, but it does not evidence an intent that private industry should be allowed to handle those materials so as to inflict intentional or reckless injury. As stated by the district court which awarded punitive damages in the instant case:

> Surely defendants would not argue that punitive damages would be inappropriate if a nuclear licensee knew of the time and manner of the plutonium's escape, but did nothing to prevent it because the regulations did not require it. Similarly, if a licensee were aware of defects within its facility that would render likely repeated exposures of employees to plutonium, but did nothing to correct it, . . . punitive damages might be considered regardless whether government regulations required those changes to be made.

Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566, 584 (W.D. Okla. 1979).

An important part of the mission of the Nuclear Regulatory Commission is to protect the health and safety of the public. 42 U.S.C. §2012(d) provides:

> The processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest in order to provide for the common defense and security and to protect the health and safety of the public.

(Emphasis supplied.) The imposition of penalties to punish a licensee for intentional or reckless infliction of injury does not frustrate the intent of Congress but rather is in furtherance of the same goal. Therefore state punitive damages statutes do not conflict with federal regulation.

B. The Court of Appeals Erred in Finding the Oklahoma Statute to be Preempted on the Grounds that it "Substantially Competes With" and "Intrudes Upon" Federal Regulation.

In striking down the Oklahoma punitive damages statute as applied to radiation

injury the court of appeals applied the wrong standard. The court did not specifically find that the Oklahoma punitive damages law conflicted with federal law. Rather, the court found that the Oklahoma law "substantially competes with" federal law. 667 F.2d at 923. The court found that awarding damages to punish bad practices and deter future bad practices "intrudes upon" the Nuclear Regulatory Commission's regulatory functions under the Atomic Energy Act, 42 U.S.C. §§2011 et seq.

The court of appeals has failed to recognize the state's paramount interest in fashioning its own tort remedies and has struck down a state tort law on grounds that are inconsistent with the test enunciated in Martinez v. California, supra, which requires that there be a conflict between the federal law and the state law before the state law falls. Since the court could not

find an actual conflict between the Oklahoma statute and federal law, it was obliged to uphold its validity. Therefore the court of appeals' decision should be reversed.

V. CONCLUSION

Based on the foregoing, the State of Minnesota by its Attorney General respectfully requests the Court to reverse the holding of the United States Court of Appeals for the Tenth Circuit declaring Oklahoma's punitive damages statute preempted by federal law as applied to radiation injuries.

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QUESTION PRESENTED

Whether the federal Atomic Energy Act preempts the application of state punitive damages law where defendant was found guilty of oppressive or malicious infliction of personal injury and property damage, and the injury was caused by plutonium from defendant's federally regulated nuclear facility.

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Appellees.

BRIEF AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

The States joined herein file this brief amicus curiae in support of Appellant's Jurisdictional Statement, pursuant to Rule 36.1 of the Rules of the Supreme Court.

INTEREST OF AMICI

At issue here is the proper relationship between Federal and State governments. This is the first reported federal case holding a state remedy for tortious irradiation of persons or property preempted under the Atomic Energy Act or where

exemplary damages have been singled out for preemption under any statute. In its decision below, Silkwood v. Kerr-McGee Corp., 667 F.2d 908 (10th Cir. 1981), the Court of Appeals for the Tenth Circuit ruled that it is unconstitutional to allow a jury to impose punitive damages for oppressive or malicious conduct, 23 Okla. Stat. § 9 (1951), if the injury was caused by radioactive materials handled by a company which was licensed by the Nuclear Regulatory Commission (NRC).

The Court of Appeals' holding introduces a broad new preemption test to this sensitive area of constitutional adjudication. If not reversed, this uncharted expansion of federal preemption beyond its present contours could seriously upset the carefully maintained balance in federal-state relations reflected in contemporary preemption doctrine. The decision of the Tenth Circuit Court of Appeals ignores recent re-

finements of the doctrine by which this Court has presumed valid the exercise of traditional state police powers not in clear and fundamental conflict with federal law. It overlooks a decade of development of Congressionally-approved state involvement in radiation matters, the contemporaneous shift in Congressional emphasis away from promotion of the nuclear industry over other forms of energy, and the transfer of energy promotion functions to the Department of Energy, leaving the NRC with the exclusive purpose of regulation for public health and safety.

Moreover, it draws into question the application of punitive damages law, and other state laws that provide civil or criminal penalties for willful or malicious conduct, in many areas where state law parallels, or "substantially competes," 667 F.2d at 923, with federal regulation. The Court of Appeals erroneously considered

this new expansive preemption test to have been mandated by this Court's summary affirmance in Northern States Power Co. v. Minnesota, 447 F.2d 1143, (8th Cir. 1971), aff'd mem. 405 U.S. 1035 (1972). Amici consider this case to frame important issues of federalism in which each of the states is interested and upon which this Court should provide guidance. By this brief amicus curiae the states joined herein support appellant's request that the substantial federal question which they present be accorded plenary consideration by the Supreme Court, so that the decision of the Court of Appeals may be reversed.

STATEMENT OF THE CASE

The representative of the estate of Karen Silkwood brought this tort action for injury caused by plutonium from defendant's federally regulated nuclear facil-

ity. The jury in this diversity suit, finding the defendants' conduct oppressive and malicious, awarded, in addition to actual damages for personal and property injuries, $10 million in punitive damages. The District Court upheld the punitive damages award, Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566, 590-91 (W.D. Okla. 1979). Chief Judge Theis rejected the claim that the federal preemption doctrine precluded award of common-law remedies for radiation injuries. On defendants' appeal, this decision was reversed in part by the Tenth Circuit, with Judge Doyle dissenting, 667 F.2d at 922-23. Rehearing, and rehearing en banc, were denied on February 19, 1982. Appellant's Jurisdictional Statement was filed on May 20, 1982.

SUMMARY OF ARGUMENT

In numerous decisions the Supreme Court

has held that a heavy presumption lies against finding preemption of state laws enacted pursuant to the states' police powers, especially laws that protect public health and safety. Moreover, the Court has been particularly reluctant to find an implied preemption of state tort law. Such presumptions should have counseled restraint in this case. But the Court of Appeals nevertheless held preempted the application of Oklahoma's punitive damages law to the defendant's oppressive or malicious handling of an ultrahazardous radioactive material, without finding any conflict with federal law or any express statement by Congress that the Atomic Energy Act was intended to have such broad preemptive effect.

In fact, the Oklahoma statute is entirely consistent with the Act's central purpose, the protection of public health and safety. Congress has expressly rejected

any purpose to compromise protection of public health as a means of promoting nuclear power, or any purpose to favor nuclear power over other forms of energy with a governmentally-sponsored advantage, such as immunity from state tort law.

The Court of Appeals found the Oklahoma statute impliedly preempted without applying to the Act and its legislative history any of the accepted criteria for determining when Congress can be said to have impliedly preempted state law. Instead the Court of Appeals created an entirely new criterion, unsupported by any precedent, of whether a state law "substantially competes" with federal law.

The application to this case of the criteria approved by the Court for determining when a state law has been impliedly preempted by Congress unmistakably reveals that Congress did not impliedly preempt the Oklahoma punitive damages law. On the

contrary, Congress has expressly stated its intent that the preemption doctrine applied in the Northern States Power (NSP) case, 447 F.2d 1143, should not apply to state regulation of airborne radiation hazards. Congress also expressly stated its intention that for injuries of the kind suffered by Karen Silkwood, existing state tort remedies -- without any exception for exemplary damages -- should be preserved.

This case can be easily distinguished from NSP, the only precedent of this Court upholding federal preemption of state legislation on nuclear matters. There is no precedent for singling out punitive damages from other state tort remedies for preemption.

This case approaches the sensitive area of state power that the Tenth Amendment was designed to protect. It also raises serious due process issues in that it

takes away the right to sue for full tort recovery under state law without giving any rights in return. The Act held here to preempt state tort law creates no substitute private cause of action. By seriously invading the historic powers of the states, the Court of Appeals' preemption decision sharply departs from the trend of decisions by which this Court has sought to preserve the constitutional balance between state and federal legislative competence and thereby safeguard an important pillar of our democratic order.

ARGUMENT

I. THE OKLAHOMA PUNITIVE DAMAGES STATUTE NEITHER CONFLICTS WITH THE ATOMIC ENERGY ACT NOR HAS CONGRESS EXPRESSED AN INTENT THAT IT BE PREEMPTED BY THE ACT.

1. THERE IS NO CONFLICT BETWEEN THE FEDERAL AND STATE LAWS.

The two kinds of conflict recognized by the Court as triggering supremacy clause scrutiny are:

> [A] a square conflict with particular provisions of federal law or [B] general incompatibility with basic federal objectives. City of Philadelphia v. New Jersey, 437 U.S. 617, 621 n.4 (1978).

A) Kerr McGee could comply with the federal nuclear regulation and at the same time conform to the standard of care required by the Oklahoma exemplary damages statute.

This is not a "square conflict" case where "compliance with both federal and state regulations is a physical impossibility" or where there is an "inevitable collision between the two schemes." Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963). Kerr-McGee can avoid oppressive, malicious or reckless handling of radioactive materials and at the same time comply with the federal policy that NRC licensees

> should ... make every reasonable effort to maintain radiation exposures, and releases of radioactive materials in effluents to unrestricted areas, as low as is reasonably achievable .... 10 C.F.R. § 20.1(c).

Obviously the Act and the NRC regula-

tions implementing the Act neither require nor encourage any of the extremely hazardous kinds of conduct for which exemplary damages might be awarded under Oklahoma law. Nor were any of the culpable acts involved here "protected by federal law," Automobile Workers v. Russell, 356 U.S. 634, 640 (1958).

B) The Oklahoma statute does not frustrate or present an obstacle to the accomplishment of the full purposes of the Atomic Energy Act.

The Court has long held, in the words of a well worn passage, that

> Our primary function is to determine whether ... [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

(1) Oklahoma tort law and the Atomic Energy Act share the same ultimate purpose of protecting public health and safety.

The central purpose of the Atomic Energy Act and the Commission it establishes is

the protection of public health and safety. § 2(e), 42 U.S.C. § 2012(e). Traditional tort remedies, including punitive damages, to the extent they are successful in shifting the social costs of hazardous enterprises back to those who profit from them, accomplish this same purpose.

Although this case is the first tort recovery for radiation injury caused by an NRC licensee, the NRC itself has admitted that the normal "operation of [nuclear] plants will cost human lives." 46 Fed. Reg. 39580, col. 2 (Aug. 4, 1981). But the peculiar nature of radiation makes proof of the causal relationship between any particular radiation injury and identifiable wrongful conduct extremely difficult. See, e.g., Burcat, "Uncompensated Victims of Low Level Radiation: Unnecessary Hostages of the Price-Anderson Debate," 15 Forum 847 (1980).

Tort remedies thus providing inadequate

deterrence, prior regulation becomes a vital means for preventing routine but non-compensable harm to the public. But where injury can be proven to have occurred as a result of willful or reckless conduct, punitive damages provide a complementary means for achieving the same purpose of deterring harmful conduct. The Court has stated:

> To hold that a state statute identical in purposes with a federal statute is invalid under the Supremacy Clause, we must be able to conclude that the purpose of the federal statute would to some extent be frustrated by the state statute. Colorado Anti-Discrimination Commission v. Continental Airlines, Inc., 372 U.S. 714, 722 (1963).

(2) The Nuclear Regulatory Commission lacks authority to promote nuclear energy by granting immunity to the nuclear industry from state prohibitions against oppressive, malicious or reckless handling of radioactive materials.

A federal purpose in addition to that of health and safety, namely promoting nuclear power, was found in Northern States Power, 447 F.2d at 1153-54, and constitut-

ed an important ground for that court's decision holding preempted a state regulation more stringent but otherwise identical to an NRC regulation. The Court of Appeals below apparently relied upon this ground when it referred to "the strong federal interest in atomic energy development," 667 F.2d at 922. But promotion of nuclear power is no longer, if it ever was, among the purposes of regulation under the Atomic Energy Act. Although, as shown below, the DOE may have authority to promote nuclear power along with other forms of energy, the issue here is the preemptive effect of NRC regulation.

Energy Reorganization Acts

In response to concern that the Atomic Energy Commission was using lax regulation as a means to promote nuclear power, in 1974, after the decisions in Northern States Power, Congress abolished the AEC and created the NRC to focus exclusively

on the purpose of regulating nuclear power to protect public health and safety; ERDA (later DOE) was given the mission of using subsidies and research to assist nuclear power as well as other energy sources. 42 U.S.C. §§ 5801-5891 (1976), id. 7151(a) (Supp. III 1979). Congress expressly stated that,

> a basic purpose of this Act [is] to separate the regulatory functions of the Atomic Energy Commission from its development and promotional functions, which are transferred to [ERDA]. S. Rep. 93-980, 93rd Cong., 2d Sess. 19 (1974).

Congress clearly expressed its intent that nuclear power was not to be favored over other sources of energy. Thus Congress stated its policy to "develop ... all energy sources." Energy Reorganization Act of 1974, §§ 2(a) & (b), 103, 42 U.S.C. §§ 5801(a) & (b), 5813 (1976). Congress warned

> against an unwarranted priority being given to any energy technology in ERDA. S. Rep. 93-980 supra at 8, 16.

> [Congress drafted the statute] to place greater relative emphasis on nonnuclear energy ... [and] designed ERDA so that its nonnuclear missions are fairly represented and funded along with the nuclear missions of the new agency .... Id. 14.

According "[e]nvironmental protection and safety activities ... overriding importance," id. 17, Congress declared:

> The mission of the new [Nuclear Regulatory] Commission is to ensure the safety and security of the nuclear industry ... and the radioactive fuels used to fuel it. Id. 2.

In the DOE Act Congress clearly stated its intent that federal energy policy be developed in cooperation with the states and in deference to their needs. 42 U.S.C. §§ 7112(11), 7113, 7133(6). This Act again showed that if Congress was biased toward any particular form of energy, it was not nuclear. On the contrary, Congress sought,

> major emphasis on the development and commercial use of solar, geothermal, recycling and other technologies utilizing renewable resources. 42 U.S.C.

§ 7112(6) (Supp. III 1979).

It would be facetious to suggest that a plaintiff should be denied punitive damages for injuries sustained from a recklessly erected windmill or geothermal facility because that would interfere with Congressional policy to promote renewable energy technologies. But nothing distinguishes this proposition from the assertion that "federal interest in atomic energy development," 667 F.2d at 922, is a ground for preempting the state punitive damage award in this case.

Clean Air Act Amendments

In 1977 Congress even more strongly reconfirmed its intent not to promote nuclear power over other forms of energy and not to grant immunity from state law as a means of promotion. In the Clean Air Act Amendments of that year Congress took pains to expressly empower states to regulate airborne radiation. 42 U.S.C. §§

7416, 7422(c). The accompanying report states unequivocally that,

> under the Clean Air Act, emission limitations may be enforced by citizen suit and State and local governments may adopt and enforce more stringent standards than the federal emission or ambient air standards.[8] [Footnote 8: Thus the committee would not preempt States from setting and enforcing stricter air pollution standards for radiation than the Federal standards and would not follow the holding in Northern States Power (citation omitted) in the context of radioactive air pollution]. These authorities and requirements ... would apply equally to radioactive pollutants, including nuclear-related emissions from power plants. H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 43 & n.8, (1977). (emphasis added)

Far from granting nuclear or any other energy industry the advantage of immunity from the costs of tort liability, Congress again stated expressly that the

> costs of protecting the public health ... must be considered a cost of doing business for the nuclear power industry just as ... [it is] for the coal-fired generating stations. Id., at 43.

Thus Congress has now eliminated the thrust of the Northern States Power

decision. First, in 1974 it separated regulation and promotion of the production and use of nuclear materials and directed the NRC to regulate exclusively for protection of the public health and safety, and then in 1977 it expressly empowered states to impose regulations more stringent than NRC regulations with respect to radioactive air emissions.

Congress recently reconfirmed its intent that federal agencies defer to state environmental requirements in an Act intended to promote coal, nuclear and other energy sources alternative to petroleum and natural gas. 42 U.S.C. §§ 8301(b), 8302(a)(17), 8322(a)(1)(c), 8352(a)(1)(c) (Supp. IV 1980).

If there were any residual purpose of promotion left to NRC regulation under the Atomic Energy Act it would now certainly be peripheral to the statute's central purpose to allow development of atomic energy

only insofar as it is "consistent ... with the health and safety of the public." Id. § 3(d), 42 U.S.C. § 2013(d). Where conflict is found on a matter peripheral to the central purpose of a federal statute, the Court instructs that,

> the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted. Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Ware, 414 U.S. 117, 127 (1973).

An exemplary damages award is easily reconciled with any such residual regulatory purpose. First, it punishes only the most unreasonable kind of conduct. Second, tort liability for punitive damages is not prior regulation at all, but addresses only actual, not merely potential, injuries. A single exemplary award in over 25 years of commercial nuclear power cannot realistically constitute a serious impediment to further development of the

multi-billion dollar nuclear industry.

2. CONGRESS HAS NOT EXPRESSLY PREEMPTED STATE EXEMPLARY DAMAGES REMEDIES FOR RADIATION INJURIES.

As stated in Northern States Power,

> no provision of the Atomic Energy Act expressly declares that the federal government shall have the sole and exclusive authority to regulate radiation emissions from nuclear power plants. 447 F.2d at 1147.

Much less does the Atomic Energy Act, or its legislative history, expressly preempt any state common law or statutory remedies for radiation injury. On the contrary, Congress has generally relied upon state tort remedies for remedying radiation injuries, without limitation. The Court below, while recognizing that Price-Anderson generally leaves tort liability for radiation injuries to state law, infra p. 26, acknowledged:

> Nowhere in the Price-Anderson Act or its legislative history have we found express mention of punitive damages. 667 F.2d at 922.

In language that was given preemptive effect in NSP, § 274(k) provides:

> Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

As simply a savings clause, subsection (k) says nothing express about preemption except that it is not intended in areas not covered by § 274. Moreover, the tort remedies in question here are not "regulations" at all. Regulations impose a general prior restraint on the conduct of all affected actors in order to reduce the possibility of injurious consequences, thereby necessarily restricting innocent and harmless conduct in the process. By contrast, a punitive damages remedy focusses only on actual injury caused by a specific actor through malice and oppression.

3. NOWHERE IN THE ATOMIC ENERGY ACT MAY BE FOUND AN IMPLIED CONGRESSIONAL INTENT TO PREEMPT THE HISTORIC POWER OF STATES TO APPLY ALL THEIR TRADITIONAL TORT REMEDIES FOR PROTECTION OF THE PUBLIC AGAINST ACTUAL RADIATION INJURIES.

Federal preemption may be effected by "implicit legislative design". City of Philadelphia v. New Jersey, 437 U.S. at 621. But preemption of the Oklahoma tort remedy for radiation injury 1) impinges upon the state's historic police power, 2) affects matters of health protection which have traditionally been committed to state power, and also 3) interferes with the enforcement of common law remedies for the vindication of actual injury. Preemption of state power is never "lightly to be presumed." New York State Department of Social Services v. Dublino, 413 U.S. 405, 413 (1973). And in these enumerated areas preemption is not to be implied unless Congressional intent to "effect that result is clearly manifested," or there is

an irreconcilable "repugnance" to federal law. Reid v. Colorado, 187 U.S. 137, 148 (1902).

A) The Court of Appeals failed to apply the standard criteria for determining whether a state law has been impliedly preempted by Congress.

Four criteria were set out in Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1146-47 (8th Cir. 1971), aff'd mem. 405 U.S. 1035 (1972), for determining when Congress has impliedly intended to preempt state law. They are 1) the intent of Congress as shown by statute and legislative history, 2) the pervasiveness of the federal regulatory scheme, 3) the nature of the regulated subject, and 4) whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

There is some question whether these criteria have the same force today as they

did when applied by the Eighth Circuit. (A summary affirmance has weaker precedential value, e.g., Mandel v. Bradley, 432 U.S. 173, 176 (1977)). In any event these criteria were virtually ignored by the Court below.

(1) intent of Congress as shown in statute and legislative history.

To the extent Congress expressed any intent concerning the survival of state remedies for radiation injuries, it clearly assumed that traditional state tort remedies would be freely available to radiation victims. See Silkwood v. Kerr-McGee Corp., 485 F. Supp.566, 573-74 (W.D. Okla. 1979). This Court has never made any distinction between punitive damages and other traditional remedies in applying federal preemption, see cases cited infra at pp. 43-46, and neither did Congress when it enacted the Atomic Energy Act.

The Court of Appeals opinion first says:

> References in the Price-Anderson Act that state law may determine tort liability may be read to permit punitive as well as compensatory damages in states like Oklahoma which permit them. 667 F.2d at 922.

But the majority concludes, without citing any statute or legislative history that,

> with respect to "extraordinary nuclear occurrences" ... the Price-Anderson Act implicitly assumes that only compensatory damages will be awarded.

In fact, the Price-Anderson Act scrupulously avoids language that might suggest only claims for compensatory damages are covered by its insurance, indemnity and liability limitation provisions. Rather the Act uses broad language clearly including exemplary damages within its scope, such as "public liability claims", § 170 (a), 42 U.S.C. § 2210(a) and passim; "suits for damage" id. (d), (e), (l); and "action" id. (h), (n)(2). Cf. § 170(g) ("compensation"); Teamsters v. Morton, 337 U.S. 252, 260 and nn. 15, 16

(1964) ("damages by him sustained," "actual damages"); City of Newport v. Fact Concerts, 453 U.S. 247, 264-65 (1981) ("compensation," "indemnify"). Indeed, reference to "willful damages" in the legislative history suggests that the prospect of punitive damages for radiation injuries was expressly contemplated by Congress. S. Rep. 2298, 84th Cong., 2d Sess. 8 (1956); "Governmental Immunity," Hearings before JCAE, 84th Cong., 2d Sess. 44, 316 (1956) (§ 169-1(a)(6) of AEC-proposed legislation mentioning damages from "bad faith, willful misconduct or gross negligence").

The Court of Appeals next cites in support of its preemption argument language from Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 93 (1978), where the Court had occasion in an entirely different context to allude to the fact that Price-Anderson provides a

"mechanism for compensating victims," as surely it does. But the Court could not have intended this statement of a truism, by mere implication, to dispose of such an important question as whether NRC licenses may also be constitutionally amenable to actions for exemplary damages where appropriate under state law. The legislative history of the Price-Anderson Act states broadly and unqualifiedly that the Act

> permits retention of state law with respect to the cause of action and the measure of damages. H.R. Rep. No. 2043 and S. Rep. No. 1605, 89th Cong., 2d Sess. 9 (1966).

Finally, the Price-Anderson Act, whatever it might indicate, lacks materiality to this case. This case involved no "extraordinary nuclear occurrence" (ENO), the prerequisite for coverage under Price-Anderson. See 45 Fed. Reg. 27590 (April 23, 1980). Duke Power, 438 U.S. at 88-89 n.33, states that before Price-Anderson persons claiming radiation injuries re-

tained the,

> right ... to utilize their existing common law and state law-remedies to vindicate any particular harm visited upon them from whatever sources.

Tort law relating to radiation injuries not resulting from an "ENO" was left entirely unaffected by the Price-Anderson Act ("in the absence of an extraordinary nuclear occurrence ... traditional concepts should be allowed to prevail;" "minor claims ... remain subject to the traditional rules of tort law." H.R. Rep. No. 2043, supra p. 28, at 11).

(2) pervasiveness of the federal regulatory scheme

The Court of Appeals, presumably alluding to this criterion, observed, without discussion, that the "nuclear industry ... is extensively regulated by a federal agency," 667 F.2d at 923. Automobiles, airplanes, drugs and many other products are extensively regulated by the federal

government yet remain subject to state punitive damage claims when handled recklessly or oppressively. As the Court recently stated:

> We reject ... the contention that preemption is to be inferred merely from the comprehensive character of federal [legislation]. The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem. New York State Department of Social Services v. Dublino, 413 U.S. 405, 415 (1973)

See also, De Canas v. Bica, 424 U.S. 351, 359-60 (1976) ("comprehensiveness ... to be expected" in immigration law: no preemption); Askew v. American Waterways Operators, Inc., 411 U.S. 325, 330 (1973) (no preemption notwithstanding "pervasive system of federal control").

The regulatory scheme created by the Atomic Energy Act, while predictably complex, nonetheless deliberately minimized federal inroads into state tort law

("one of the cardinal attributes of the Price-Anderson Act has been its minimal interference with State law .... [T]he claimants' right to recover is left to the tort law of the various states ...." S. Rep. No. 1605, supra p. 28, 6). The Act itself creates no private cause of action of any kind. Susquehanna Valley Alliance v. Three Mile Island, 619 F.2d 231, 237-39 (3rd Cir. 1980), cert. denied 449 U.S. 1096 (1981). The Act's liability provisions are far from pervasive. Rather, for non-ENO's, as stated elsewhere,

> Congress has left the area unattended, and no reason exists why the states should not be free to act. Goldstein v. California, 412 U.S. 546, 570 (1973) (Burger, C.J.).

The Act does provide modest civil penalties for violation of license and regulatory provisions, as well as criminal sanctions. See AEA § 234, 42 U.S.C. § 2282. But licenses and regulations say nothing about liability for tortious -- let

alone recklessly or willfully inflicted -- injuries caused by licensees. Hence these provisions cannot be regarded as direct substitutes for tort actions. Moreover, the original maximum amount of civil penalties allowed, $5000 per violation and $25,000 for all violations occurring in a 30 day period, is no substitute for the deterrent effect of substantial tort recovery, including exemplary damages, where conduct of a multi-billion dollar corporation has been proven to be oppressive, malicious, or reckless of human life. 42 U.S.C. § 2282(a) (1976) (amended 1980).

(3) "nature of the regulated subject"

This criterion has been defined as including a) any subject "by its very nature admitting only of national supervision, cf. Cooley v. Board of Port Wardens, 12 How. 299 [1851]," or b) any subject that demands "exclusive federal regulation

in order to achieve uniformity vital to the national interest." Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142, 143-44 (1963) (emphasis added).

a) Damage awards for injuries from reckless, oppressive or malicious management of nuclear facilities no more require "national supervision" than they would for a coal fired plant or other energy source.

The Court of Appeals stated, without discussion, that the "nuclear industry ... is closely linked to national security," 667 F.2d at 923, presumably alluding to test "a" quoted above. National security is of course a responsibility of the federal government suitable for exclusively national supervision. But not all state legislation pertaining to matters that are "linked" to national security is preempted. States regulate firearms, highways, education, heavy industry and countless matters "linked" in various ways with national security. Unlike truly military

affairs, see Feres v. United States, 340 U.S. 135 (1950); Jaffee v. United States, 663 F.2d 1226 (3rd Cir. 1981) (en banc), cert. denied 50 U.S.L.W. 3910 (May 18, 1982), activities involving these matters are not accorded an immunity from tort damages.

Congress' clearly expressed intent that states do have a role to play, not only in enforcing state remedies for radiation injuries but also by assumption of regulatory powers under the Atomic Energy Act, § 274, 42 U.S.C. § 2021(a)(1) & (2), shows that Congress does not consider the use of nuclear materials to admit "only of national supervision." Indeed, the Commission was authorized to enter into agreements with states under which it could, with certain exceptions, discontinue its regulatory authority under the Act for regulating nuclear materials and transfer this authority to contracting states.

Id. (b). Nowhere does the Act or its legislative history suggest that federal regulation of nuclear energy is to be exclusive.

b) Congress has not expressed a need for uniformity among the states in the assessment of punitive damages for reckless or malicious management of nuclear facilities, or for any other punitive measures with regard to management of nuclear facilities.

While the Act provides that radiation standards should be developed for the "guidance of Federal agencies," which term arguably intends uniformity, only "cooperation" was sought with the States concerning the same standards, AEA § 274(a) (6). "Cooperation" suggests more flexibility and reciprocal concession, more tolerance of variety than does the term "guidance". Thus § 274 suggests that Congress did not consider uniformity necessary at the State level for fixing environmental radiation standards.

This interpretation was confirmed by the Reorganization Plan No. 3 of 1970, by which regulation of radiation standards came under the jurisdiction of the EPA. 5 U.S.C. app. at 609, 84 Stat. 2086, 3 C.F.R. § 1072. Under this Plan, EPA was to set generally applicable standards for the protection of the environment from radioactive materials. See Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 24 n.20 (1976). Where the EPA has authority to fix radiation pollutant standards, concurrent state-imposed standards are not subject to preemption. Id. 22 (water); 42 U.S.C. § 7422 (air).

No "unambiguous congressional mandate," 373 U.S. at 147, can be found which states that uniformity is needed in setting environmental standards, or the standard of care, appropriate to deter radiation injuries. In fact, the opposite is clearly implied.

(4) Whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"

The NSP court dealt with this test under the rubric "implied preemption." This test also relates to "conflict," where it has been discussed above, pp. 9-21.

Congress does not intend NRC regulation to serve the promotion of the nuclear industry. Supra, pp. 14-16. State tort law complements the NRC's regulatory purpose to promote health and safety, supra pp. 10-13. In any event, the Oklahoma punitive damages statute presents no obstacle to the further development of atomic energy, supra p. 20. Exemption from punitive damages is not "essential to the financial soundness" of the nuclear industry or the "preservation of [its] very existence." Fidelity Federal S. & L. Assn. v. de la Cuestra, --- U.S. ---, slip op. at 13, 28 n. 23 (June 28, 1982).

B) The Court of Appeals created a new test for finding implied preemption never before applied by the courts.

The Court of Appeals could not find actual conflict between the Oklahoma punitive damages statute and the Atomic Energy Act nor an implied intent to preempt under the accepted tests. Instead it adopted a wholly new "substantially competes" test, 667 F.2d at 923. By this the Court of Appeals apparently meant that the state law accomplished the same goal, i.e. deterrence of oppressive or malicious handling of nuclear material, as federal regulation.

This new test is not part of the conflict theory of preemption, because the "competition" in this case involves not conflicting but compatible purposes. Nor does the new test fit any of the accepted criteria under the implied intent theory of preemption. Yet this test provides the principal statement of the rationale for the Court of Appeals' decision below.

The creation of this new test by the Court of Appeals provides a major reason why the Court should take jurisdiction of this case so as to disavow the implications such a test might have for the validity of numerous state laws which touch on matters covered by federal legislation.

C) The Court of Appeals failed to give effect in this case to well-established presumptions against preemption.

As noted earlier, preemption of state laws by federal law is never to be assumed. Seventy years ago this Court laid down the basic principle in Savage v. Jones, infra p. 42, 225 U.S. at 533, that preemption of state police powers is not to be implied in the absence of actual conflict with an Act of Congress.

In this case the federal law does not provide a remedy to Karen Silkwood's estate for the damages suffered by her before her death nor is the federal law in "actual conflict" with the state law.

When faced with comparable situations this Court has consistently refused to strike down state law. These decisions have reflected basic legal principles which are fundamental to a truly federal system of government. The Court of Appeals' decision in this case violates those legal principles.

(1) Considerations of federalism create a presumption against preemption of state health and safety protections under traditional state police powers.

In Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) the Court stated,

> we start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. See also Reid v. Colorado, 187 U.S. 137, 148 (1902) (emphasis added).

Justice Rehnquist states the democratic underpinning of this principle as follows:

> This assumption derives from our basic constitutional division of legislative competence between the States and Congress; from "due regard for the presuppositions of our embracing federal system, including the principle of dif-

> fusion of power not as a matter of doctrinaire localism but as a promoter of democracy ...." San Diego Building Trades Council v. Garmon, 359 U.S. 236, 243 (1959) (emphasis added). Unless the requisite pre-emption intent is abundantly clear, we should hesitate to invalidate state and local legislation for the added reason that "the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power remains free to remove the burden" (citation omitted). City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624, 643 (1973) (dissent).

See also Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). The general rule of deference to legislation within the state's historic police powers is given special weight when, as here, health and safety issues are involved. E.g., Maurer v. Hamilton, 309 U.S. 598, 614 (1940) (preemption must be "clearly indicated ... especially when public safety and health are concerned"). But this most traditional of the state's police powers was denied here on the merest "speculation about the unexpressed intent of Congress,"

New York Telephone Co. v. New York State Dept. of Labor, 440 U.S. 519, 545 (1979), rather than on the basis of the required,

> explicit declaration of congressional design to displace state regulation. Florida Lime, 373 U.S. at 143.

In Savage v. Jones, 225 U.S. 501, 533. (1912) the Court foreclosed the approach the Court of Appeals took in this case:

> [I]ntent to supersede the exercise by the State of its police powers as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the Act of Congress fairly interpreted is in actual conflict with the law of the State.

The Court of Appeals violated this long standing principle when it simply equated punitive damages with regulation, which in fact is entirely different, infra pp. 51-52, and then, from the "mere fact that Congress has seen fit to circumscribe its regulation" of radiation hazards, without any consideration of actual conflict,

infers that whatever can be denominated "regulation" of radiation -- though nowhere covered or even mentioned in the federal statute -- is necessarily preempted by it, 667 F.2d at 922.

(2) State tort law cannot be preempted in the absence of clear and unavoidable conflict with a federal statute

Protecting the residual powers and sovereignty of the states is the very essence of federalism, and this Court has consistently protected state tort law from federal preemption absent unavoidable conflict with federal law. This concern to protect state tort law from federal preemption is illustrated in several cases decided by the Court in recent years.

In Nader v. Allegheny Airlines, 426 U.S. 290 (1976), plaintiff was awarded $10 actual and $25,000 punitive damages in his common law claim arising out of overbooking on an airline regulated by the Civil Aviation Board. CAB regulations covered

the subject of overbooking and defendant claimed that this regulation preempted the field. Although this was not an area relating to traditional police powers and it was not clear that state regulation of this activity would be preempted, the Court rejected defendant's argument, upholding a presumption that common law rights are not abrogated by a subsequent federal statute,

> unless it is found that the preexisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy, in other words, render it nugatory. Id. at 298. ...[W]here Congress has sought to confer ... power [to immunize from common law tort liability] it has done so expressly, Id. at 301 (emphasis added).

In Nader the Court refused to preempt in the absence of actual conflict:

> [T]here is no board requirement that air carriers engage in overbooking.... [T]he common law action and the statute are not "absolutely inconsistent" and may coexist .... Id.
> ... [M]ere compliance with agency regulations is not sufficient in itself under the Act to exempt a carrier from

common law liability. Id. 308 n. 19.

In the field of labor law the preemption doctrine has developed primarily by judicial decision because of the perceived need for a national labor relations policy warranting a broader than usual preemptive reach for federal law. Distinctions developed in this area can provide a useful indication of the extreme limits of preemption under the Atomic Energy Act. In this field, as elsewhere, the Court has consistently preserved against preemption the right of the states to enforce traditional common-law remedies, including punitive damages, for tortious conduct. See United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1950) ($100,000 punitive damages on a state tort claim for what was also an unfair labor practice). This preservation of state tort law applies not only to damage actions for direct physical harm, as was

involved in Silkwood, but even extends to such other torts as libel, Linn v. Plant General Workers, 383 U.S. 53 (1966), intentional infliction of mental distress, Farmer v. United Brotherhood of Carpenters, 430 U.S. 290, 302-03 (1977) ($175,000 punitive damages), and interference with lawful occupation, Automobile Workers v. Russell, 356 U.S. at 641 ($9500 punitive damages; $500 for back wages though the federal Act presumably would provide back pay award).

In Farmer the Court articulated a test to define those tort claims that would not be preempted by federal law, even where a federal tribunal has jurisdiction over the same conduct. State remedies will not be preempted when, 1) "there existed a significant state interest in protecting the citizen from the challenged conduct," 2) "the respective controversies presented to the state and federal forums would not have

been the same," and 3) "state regulation of the conduct alleged in the complaint would [not] result in prohibition of conduct protected by the federal Act." See Sears Roebuck & Co. v. Carpenters, 436 U.S. 180, 196-97 & nn.25,26 (1978) (summarizing three Farmer criteria).

It requires no discussion to show that if the Silkwood case were subjected to this test by which punitive damages were upheld from preemption in Farmer, each of these three criteria would be easily satisfied and the decision below reversed.

In United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656, 665 (1950), the Court concluded:

> To the extent ... that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. ...The primarily private nature of claims for damages under state law also distinguish them in a measure

> from the public nature of the regulation of future labor relations under federal law.

The decision in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), illustrates how far federal law must go to preempt state tort law. While holding a state law that enjoined and punished peaceful picketing preempted because it did not involve protection against violent conduct and because it punished action specifically protected, and not merely allowed, by federal law, the Court articulated the basic notion that

> in the absence of compelling congressional direction, we could not infer that Congress had deprived the state of the power to act. 359 U.S. at 243.

Cited with approval in New York Telephone Co. v. New York State Dept. of Labor, 440 U.S. 519, 540 (1979), upholding a New York statute granting employer-financed unemployment compensation to striking workers not preempted by federal labor law notwith-

standing the disruption this entailed for federal promotion of balance in negotiating strength between labor and management. The dissent in New York Telephone agreed that,

> laws protecting against personal torts or violence to property ... have defined the "local feeling and responsibility" exception to preemption. 440 U.S. at 560 (emphasis added).

Although this Court has not squarely faced the issue of preemption as related to aircraft noise and state common law nuisance claims for damages, the issue has been decided by state supreme courts. E.g., Greater Westchester v. City of Los Angeles, 160 Cal. Rptr. 733, 603 P.2d 1329 (1979), cert. denied, 499 U.S. 820 (1981). These courts have found that although as held in City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973), state or local regulation of airport noise was preempted by federal

regulations, state tort law providing damages for noise within the federal standards was not preempted.

These cases illustrate the important distinction, ignored by the court below but clearly recognized in the airline overbooking and labor cases, that providing damages -- whether punitive, compensatory or both -- for conduct subject to federal regulations is not the equivalent of regulating the conduct, and thus absent express Congressional intent or actual conflict with federal law the state tort law will be protected from federal preemption.

II THE AWARD OF PUNITIVE DAMAGES IN THIS CASE CAN BE EASILY DISTINGUISHED FROM THE STATE REGULATION PREEMPTED IN NORTHERN STATES POWER v. MINNESOTA.

The only other Court of Appeals decision to preempt state law relating to radiation -- Northern States Power -- held that

> the federal government has exclusive authority under the doctrine of preemption to regulate the construction and operation of nuclear power plants,

> which necessarily includes regulation of the levels of radioactive effluents discharged from the plant. 447 F.2d at 1154.

Properly limited to its facts, NSP may still define the valid scope of implied preemption under the Atomic Energy Act. But the following points easily distinguish NSP from the instant case:

1) Only "regulation" is mentioned in § 274(k), 42 U.S.C. § 2021(k), the source of Congress' implied intent to preempt. The regulation involved in NSP is substantially different than the state tort remedy involved here which is not a "regulation" at all. Silkwood involves a remedy for actual injuries rather than prevention of predicted harms. The Atomic Energy Act creates no private damages action for injuries. Accordingly, the "respective controversies" as between an NRC enforcement proceding and a tort action including a punitive damages claim are not

even remotely "the same." Supra p. 47.

2) NSP dealt with water effluents. Karen Silkwood was injured through inhaling plutonium into her lungs, hence necessarily from an airborne source of pollution. The Clean Air Act and its legislative history expressly state that state power to regulate airborne radioactive pollutants is not to be preempted. Supra p. 18.

3) The Oklahoma statute, unlike the Minnesota statute, is a law of general applicability not directed only at nuclear materials but rather at all forms of oppression and malice. The plurality opinion held

> that a congressional intent to deprive the states of their power to enforce such general laws is more difficult to infer. New York Telephone Co. v. New York State Dept. of Labor, 440 U.S. 519, 533 (1979).

4) The question of punitive damages for reckless or malicious management of a nuclear facility is peripheral to the cen-

tral purpose of the Atomic Energy Act, and the regulations pursuant thereto, whereas the Minnesota regulation involved in the NSP case was virtually identical in form and purpose to the federal regulation except that it enforced stricter numerical standards for radioactive effluents than did the federal regulation. As stated in San Diego Building Council v. Garmon, 359 U.S. 236, 243 (1959),

> due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power ... as a promoter of democracy, has required us not to find withdrawal from the states of power to regulate ... activity [of] merely peripheral concern to [the Federal Act].

5) The only brief filed in the Supreme Court in support of the Northern States Power decision relied heavily on the following concern:

> To permit the various States to enact differing regulations with respect to radioactive discharges would result in variations in nuclear plant design and operating procedures from State to

> State and might significantly frustrate efforts to develop a safe and reliable nationwide system of nuclear power generation. "Memorandum for the United States as Amicus Curiae," 6.

Such a concern for uniform plant design, even if it were more real than theoretical, can be of no pertinence to a punitive damages action which addresses oppressive or malicious conduct at this or any factory, not power plant design objectives.

6) NSP was decided in 1972, prior to Congress' clear delineation of the NRC's primary purpose under the Atomic Energy Act to regulate for the promotion of public health and safety, not nuclear energy.

III REVOCATION OF STATE PERSONAL INJURY TORT REMEDY BY IMPLIED PREEMPTION RAISES IMPORTANT ISSUES OF FEDERALISM AND MAY VIOLATE THE TENTH AND FIFTH AMENDMENTS.

In Cooley v. Board, 12 How. at 326, Justice Daniels, concurring, expressed the view that certain powers are inherent in the states and cannot be wholly preempted

by federal law. He stated:

> The power delegated to Congress by the Constitution ... do[es] not necessarily nor even naturally extend to the means of precaution and safety adopted within the ... limits of the States .... These last subjects are essentially local .... This is a power which is deemed indispensible to the safety and existence of every community. It may well be made a question, therefore, whether it could, under any circumstance, be surrendered; but certainly it is one which cannot be supposed to have been given up by mere implication .... [T]his is an original and inherent power in the States, and not one to be merely tolerated, or held subject to the sanction of the federal government.

Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 91 (1978) upheld the ENO liability limitation provision of the Atomic Energy Act, stating that plaintiffs received "a fair and reasonable substitute." While Price-Anderson gave claimants a waiver of defenses, the Atomic Energy Act of 1954 gave affected persons no substitute for a state-law punitive damages action -- neither a federal cause of action for damages nor even a pri-

vate action to enjoin conduct destined to injure them. Supra p. 31. A statute that destroys a common law right without providing a reasonable substitute raises a serious question of violation of Fifth Amendment due process rights. It is the policy of the Court to interpret ambiguous statutes so as to avoid constitutional issues.

The traditional remedy of punitive damages is no less important than other forms of damage under this due process analysis. In many states punitive damages encompass some forms of compensatory damage such as mental distress, or are intended to compensate for expenses of vindicating the public's rights through litigation. It was well stated that,

> The law giving exemplary damages is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential and unscrupulous, vindi-

> cates the right of the weak and encourages recourse to and confidence in the courts of law by those wronged or oppressed by acts or practices not cognizable in or not sufficiently punished by criminal law. Luther v. Shaw, 157 Wis. 234, 238, 147 N.W. 18, 20 (1914).

CONCLUSION

The Court of Appeals' decision overturning the Oklahoma jury's award of punitive damages on grounds of federal preemption should be reversed and the award should be reinstated.

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APPENDIX

23 Okla. Stat. § 9. Jury may give exemplary damages, when

In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant.

MOTION FILED
JAN 5 1983

No. 81-2159

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

BILL M. SILKWOOD, Administrator of the Estate of KAREN G. SILKWOOD, Deceased
Appellant

v.

KERR-McGEE CORPORATION and KERR-McGEE NUCLEAR CORPORATION,
Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION OF THE STATE OF WISCONSIN AND ACCOMPANYING BRIEF AMICUS CURIAE IN OPPOSITION TO BRIEF OF SOLICITOR GENERAL

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No. 81-2159

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

BILL M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, Deceased

Appellant

v.

KERR-McGEE CORPORATION, a Delaware Corporation and KERR-McGEE NUCLEAR CORPORATION, a Delaware Corporation

Appellees

MOTION FOR LEAVE TO FILE STATE AMICUS CURIAE BRIEF IN OPPOSITION TO BRIEF OF SOLICITOR GENERAL

Pursuant to Rule 36 of the Rules of the Supreme Court, movant respectfully requests leave to file the accompanying brief amicus curiae in opposition to the brief of the Solicitor General herein.

The brief of the Solicitor General raises substantial questions concerning the power of the states to enforce laws of

general application pursuant to traditional police powers, for protection of public health and safety. The States amici on the acompanying brief seek to present for the consideration of the court views responsive to the points made by the Solicitor General on the profoundly important questions of federalism raised in this matter.

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Appellant

v.

KERR-McGEE CORPORATION, a Delaware Corporation and KERR-McGEE NUCLEAR CORPORATION, a Delaware Corporation

Appellees

BRIEF AMICUS CURIAE IN OPPOSITION TO BRIEF OF SOLICITOR GENERAL

SUMMARY AND INTEREST OF AMICI

In response to this Court's Order of October 4, 1982, the Solictor General of the United States filed herein an amicus curiae brief dated November, 1982 presenting the views of the United States regarding the federal preemption of state law ordered by the court below, Silkwood v. Kerr-McGee Corporation, 667 P.2d 908

(10th Cir. 1981). The Solicitor General's brief, which supports the 10th Circuit's decision to reverse a jury's award of punitive damages under Oklahoma's exemplary damages statute, 23 Okla. Stat. 9, represents an endorsement by the U.S. Justice Department of a major and unprecedented undermining of traditional states' rights. Few decisions have so seriously encroached upon the authority of state and local governments to provide health and safety protection for their citizens. The decision below, if not reversed, will leave states powerless to meaningfully protect their citizens against reckless and life threatening mishandling of radioactive materials. The States joined herein submit this brief pursuant to Rule 36 of the Rules of the Supreme Court, in response to the too facile arguments and analysis of the Solicitor General. Amici consider this

case to frame important issues of federalism in which each of the states is interested. Amici support appellant's request that this case be given plenary review so that the decision of the Court of Appeals may be reversed.

ARGUMENT

Contrary to the assertions of the Solicitor General at pages 12 and 13 of his brief, Congress has never expressly precluded state regulation of hazardous radioactive materials, nor expressly withheld any authority from the states pursuant to Section 274(k) of the Atomic Energy Act of 1954, 42 U.S.C. 2021(k). This view was confirmed by the Eighth Circuit in Northern States Power Co. v. Minnesota, 447 F.2d 1143 (1971) aff'd mem. 405 U.S. 1035 (1972), which held,

"no provision of the Atomic Energy Act expressly declares that the federal government shall have the sole and exclusive authority to regulate radiation emissions from nuclear power plants." 447 F.2d at 1147.

In evaluating the preemptive effect of Section 274(k), the Northern States Power court applied several detailed criteria, 447 F.2d at 1146-1167. On the basis of these criteria, the court determined that a state regulation which limited the release to the environment of radioactive wastes from nuclear power plants by setting emissions standards lower than those fixed by the Nuclear Regulatory Commission (NRC) had been implicitly preempted by Congress.

The conclusion of the Northern States Power court is not questioned here. What is questioned, however, is the expansion

by the court below of the Northern States Power holding beyond anything ever envisioned by Congress- specifically, its conclusion that the Atomic Energy Act preempts the very narrow authority traditionally vested in the states to provide health and safety protections for their citizens through common law or statutory tort remedies. As conclusively shown by the State amici in their brief filed on July 17, 1982 in support of appellant's jurisdictional statement ("States' Brief"), Congress did not expressly or impliedly intend such broad preemptive effect, nor does there exist an unavoidable conflict between the state and federal law to force a conclusion that the two laws cannot constitutionally stand together.

Both the Court of Appeals and the Solicitor General rely heavily on Northern States Power to support preemption of the

Oklahoma punitive damages statute at issue here. This reliance is entirely misplaced.

To begin with, federal policy toward nuclear power has changed dramatically since this Court reviewed Northern States Power in 1972. Congress has in fact substantially overruled the case by passing the Clean Air Act Amendments of 1977, 42 U.S.C. 7401 et seq, which explicitly returns to state and local governments the power to regulate radiation hazards associated with radioactive air emissions.

Moreover, since Northern States Power, Congress has significantly changed the federal government's policy toward nuclear power, eliminating one of the Eighth Circuit's principle justifications for preempting the Minnesota statute. Specifically, Congress has now articulated a policy not to promote nuclear power or favor it over other energy forms. See,

States' Brief at 14-15. In 1974 Congress abolished the Atomic Energy Commission and created the NRC to focus exclusively on regulating nuclear power for the purpose of protecting the public health and safety. The development and promotional functions of the AEC were shifted to an entirely new governmental body created under an entirely new act of Congress. Under the new statutory scheme, nuclear power is not to be favored over other forms of energy. Thus, the court below is plainly wrong to advance the theory, perhaps valid at one time, that a "strong federal interest in atomic energy development," 667 F.2d at 922, now requires preemption of the state tort remedy at issue in this case.

Additionally, the facts of Northern States Power are explicitly distinguishable from those in the instant case. Most importantly, the Minnesota statute at issue in NSP regulated conduct related

to the operation of a nuclear power plant. It was precisely this type of state law -one regulating operation of a plant- which was found by the court to trigger the implicit preemptive effect of Section 274(k). It is one thing for a court to find implicit preemption under Section 274(k) of a state statute which directly regulates the operation of nuclear power plants - a function broadly served by a federal agency, the NRC. It is quite another thing, however, for a court to preclude a state from enforcing its own generally-applicable exemplary damages statute merely because it is applied to conduct which is also subject to federal regulation. A tort remedy is plainly not equivalent to a "regulation." It is invoked only to remedy actual injury, not to prevent predicted harm. Indeed, even in instances where the federal statutory direc-

tion is less clear, this Court has always accorded special deference to state tort laws in protecting them from federal preemption. See, States' Brief at 43-50.

Notably, Congress has never expressed an intent that the Atomic Energy Act preempt state tort remedies, particularly where individuals are injured by intentional or reckless handling of radioactive materials by a company licensed under the Act. Nor does the overall statutory scheme of the Act mandate such a conclusion. Section 274(k) itself is merely a "savings clause" which by its language preserves no exclusive authority to the federal government, but rather limits encroachment on state authority, if any, which the regulatory scheme may otherwise suggest. Moreover, other portions of the Act contain language indicating that Congress did not intend the federal government's authority to be exclusive in the regulation of nuclear

energy, or in the provision of remedies for radiation injuries. See, 42 U.S.C. 2021(a)(1)&(2), (g), (i).

When the issue of state tort remedies arose during Congress' consideration of the Price-Anderson Act, 42 U.S.C. 2210, Congress stated categorically that it intended states to apply their own tort laws in determining liability in nuclear litigation. See, H.R. Rep. No. 2043 and S. Rep. No. 1605, 89th Cong., 2d Sess. 9 (1966). Further, Congress made no distinction between the particular form of damages which were to be available to a litigant seeking relief under state tort law for radiation injuries. But as noted in the States' Brief at 28, Price-Anderson lacks materiality to resolution of issues in this case, since an "extraordinary nuclear occurrence" (ENO) is a prerequisite for coverage. State tort law rela-

ting to radiation injuries from "lesser events," or non-ENO's such as the instant case clearly is, was intended by Congress to remain entirely unaffected by Price-Anderson. H.R. Rep. No. 2043, supra, at 11.

Both the Court of Appeals and the Solicitor General make curious use of this seemingly clear expression of Congressional intent to support their conclusion that first, Price-Anderson's statutory ceiling on damages recoverable by private litigants against a private nuclear facility liable for causing an ENO is somehow inconsistent with the allowance of punitive damages, and second, that the same is true for lesser events entirely outside the purview of the Act. See, Solicitor General's Brief, at 15; 667 F.2d at 922. Both suggest that Congress' failure to discuss punitive damages in the legislative history necessarily evidences its belief that such damages are inappropriate remedies

under Price-Anderson. Id. This is not only wrong, but it conflicts with a long line of Supreme Court rulings that have erected a strong presumption against pre-emption of state laws enacted pursuant to the states' police powers, particularly those laws that protect public health and safety. See, States' Brief at 40-43. The issue here is not whether Congress expressly authorized the application of punitive damages, as the Solicitor General suggests, but whether it expressly or impliedly preempted them.

To arrive at the derivative conclusion that Congress did not intend the use of punitive damages for non-ENO events outside the purview of Price-Anderson, the Solicitor General first simply registers support for a distorted reading by the court below of the word "compensating," used in Duke Power Co. v. Environmental Study Group, Inc., 438 U.S. 59, 93 (1978). The

court below incorrectly interpreted the Supreme Court's mere observation in Duke Power that Price-Anderson compensated victims of ENO's, to be a declaration on its part that only compensatory and not punitive damages were to be available for such incidents. The Solicitor General then baldly asserts that punitive damages should be unavailable for non-ENO's as well. See, States' Brief at 27-29. This conclusion lacks any reasoned basis whatsoever, and is in fact inconsistent with the express intent of Congress to retain all state tort remedies as a basis for liability in radiation claims not declared to be ENO's.

The Solicitor General also suggests that Congress' "rejection of an Atomic Energy Commission proposal that the government [insurance fund] not be liable 'for loss or damage caused by bad faith, willful misconduct or gross negligence' on

the part of the [insured] licensee," cannot be considered evidence that Congress affirmatively contemplated the availability of punitive damages since that rejection was meant "not in order to allow punitive damages, but in order to assure compensation in all cases." Solicitor General's Brief at 15. Clearly, the more logical interpretation is that the proposal was rejected to insure full recovery of damages in all cases by specifically allowing for insurance coverage of punitive damages. The legislative history of the Act clearly shows that Congress contemplated the availability of "willful" damages, which equally clearly implies that Congress did not intend preemption of punitive damages. See, S. Rep. 2298, 84th Cong., 2d Sess. 8 (1956); States' Brief 27.

The Solicitor General's use of Dean Cavers' statement to buttress his argument

is particularly odd since both of Dean Cavers' suggestions were rejected by Congress. Solicitor General's Brief at 15-16, footnote 19. The Solicitor General's final comment, id., that somehow the NRC itself assumes that punitive damages are unavailable remedies because NRC licensees can raise "federal preemption" as a defense against punitive damage claims, stretches his argument to absurd proportions. If the NRC believed that punitive damages were legally prohibited, it would have simply said so in its regulations.

The Solicitor General also alludes in several instances to an alleged inconsistency or conflict between the Atomic Energy Act and the Oklahoma exemplary damages statute which would mandate preemption of the state law. The State amici have already conclusively shown this not to be the case. States' Brief at 9-22. Both state and federal efforts pur-

sue the common purpose of protecting public health and safety by deterring harmful conduct. The Oklahoma law does not interfere with accomplishment of the federal objectives in any way. Only if the purpose of NRC regulation was to promote the private nuclear power industry by immunizing from liability its acts which recklessly and willfully injure the public, could the Oklahoma statute interfere with the federal scheme. Needless to say, Congress has not established such a policy.

The Solicitor General presents for the Court's consideration the hypothetical case whereby a state agency would levy a fine against appellees for violating state law punishing the reckless and wanton infliction of physical injury by means of diverted radioactive materials. The Solicitor General, citing no authority in support, asserts that "there is no doubt that its action would be preempted by the

Atomic Energy Act." Solicitor General's Brief at 14. He then leaps to the conclusion that "[l]ike a civil fine, the award of ... punitive damages here directly conflicts with the exclusive authority given the NRC to regulate the health and safety hazards associated with plutonium and production facilities." Id.

As to his first premise, which has never been considered by this or any other court, there is of course considerable doubt whether such a state enforcement action would be preempted. If a state chose to prosecute for manslaughter and sought a sizable fine against a corporation for recklessly causing the fatal contamination of one of its citizens by radioactive materials, or alternatively imposed a civil fine in similar circumstances, only by some vast expansion of preemption doctrine heretofore contemplated only by the Solicitor General and certainly not by

Congress, could such an exercise of traditional state power be held impliedly or expressly preempted by Congress. As to his derivative conclusion, the Solicitor General ignores entirely the distinction which Congress and the courts have historically made between regulation on the one hand, and tort remedies on the other, to which they have always accorded special deference. See , States' Brief at 43-50. In short, the Solicitor General is simply wrong both in his general premise and in his derivative conclusion.

As the Solicitor General demonstrates, the NRC has promulgated a number of federal regulations aimed at advancing the interests of the public health and safety. Solicitor General's Brief at 12-13. The fact remains, however, that these regulations do not even purport to be comprehensive. They provide no tort remedies because the Atomic Energy Act does not

create a private damages action for radiation injuries. Far from expressing any desire that federal regulation be the exclusive means of meeting tort liability problems, Congress has indicated just the opposite intent. Certainly where the federal government has failed to effectively exercise its powers to protect the public, such as by providing adequate remedies to those injured by NRC licensees, the states must be able to exercise their own concurrent police powers to provide such effective remedies. In this case, the jury found, upon listening to the evidence, that Oklahoma's exemplary damages statute appropriately remedied an injury which the federal government did not.

CONCLUSION

Nowhere in the Atomic Energy Act or its legislative history has Congress ever

suggested an intent that the Oklahoma statute should not be enforced. For the courts to rule this statute preempted in the absence of some clear indication from Congress would amount to an unwarranted attack on the traditional rights of the states to protect the health and safety of their citizens.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

BILL M. SILKWOOD, ADMINISTRATOR OF THE ESTATE OF KAREN G. SILKWOOD, DECEASED, APPELLANT

v.

KERR-MCGEE CORPORATION AND KERR-MCGEE NUCLEAR CORPORATION

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the award of punitive damages for injury caused by a federally licensed plutonium processing facility is preempted by the Atomic Energy Act.

2. Whether the preemption of punitive damages violates due process or equal protection.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2159

BILL M. SILKWOOD, ADMINISTRATOR OF THE ESTATE OF KAREN G. SILKWOOD, DECEASED, APPELLANT

v.

KERR-MCGEE CORPORATION AND KERR-MCGEE NUCLEAR CORPORATION

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order of October 4, 1982, inviting the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-40a) is reported at 667 F.2d 908. The opinion of the district court denying appellees' post-trial motions (J.S. App. (II) 42a-93a) is reported at 485 F.Supp. 566.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1981 (J.S. App. 1a). A petition for rehearing (J.S. App. 41a) was denied on February 19, 1982. A notice of appeal to this Court (J.S. App. (II) 127a) was filed on May 10, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the Constitution, Section 274(k) of the Atomic Energy Act of 1954, 42 U.S.C. 2021(k), and Okla. Stat. Ann. tit. 23, § 9 (West 1955) are set forth at J.S. App. (II) 137a, 144a, 151a.

STATEMENT

1. Karen Silkwood worked as a laboratory analyst in the Cimarron plant of the Kerr-McGee Nuclear Corporation, a subsidiary of Kerr-McGee Corporation[1] located near Crescent, Oklahoma (J.S. App. 3a). The plant manufactured pins containing plutonium which were used as fuel for nuclear reactors (*ibid.*). It was licensed by the United States Nuclear Regulatory Commission ("NRC").[2]

On November 5, 1974, Silkwood was contaminated with plutonium during her work at the plant. She was immediately decontaminated and placed on a urine and fecal testing regimen (*id.* at 4a-5a). Contamination was again found while she was at work on November 6, and she was again decontaminated. When she reported for work on November 7, 1974, some of her urine and fecal samples showed plutonium contamination and she was contaminated on various parts of her body (*id.* at 5a). It

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[1] Parent and subsidiary will be referred to collectively as "Kerr-McGee" or "appellees."

[2] The Atomic Energy Commission, which originally licensed the Kerr-McGee plant, was abolished by the Energy Reorganization Act of 1974, 42 U.S.C. (& Supp. IV) 5801 *et seq.* Its licensing and regulatory functions were transferred to the Nuclear Regulatory Commission. 42 U.S.C. 5841(f). For the sake of convenience both agencies will be referred to as "NRC."

Kerr-McGee was issued a license "to possess and use special nuclear material in a plutonium processing and fuel fabrication plant." See 10 C.F.R. 70.21(a).

was stipulated that her urine samples had been "spiked" with plutonium. Silkwood's apartment was also found to be contaminated (*ibid*). Silkwood was killed in an automobile accident less than a week later, on November 13, 1974 (*id.* at 6a). An autopsy showed that her body contained "between 25% and 50% of the permissible lifetime body burden [of plutonium] allowed by the [NRC] for plutonium workers" (*ibid.*).

2. Bill M. Silkwood, as administrator of Karen Silkwood's estate, brought this diversity suit against Kerr-McGee in the United States District Court for the Western District of Oklahoma (J.S. App. (II) 42a).[3] He sought damages of $1.5 million under state law for personal injuries (primarily fear and anxiety) suffered by Karen Silkwood between the time of her contamination with plutonium on November 5, 6, and 7, 1974 and her death on November 13, 1974 (J.S. App. 2a; J.S. App. (II) 96a). Damages in the stipulated amount of $5000 were sought for her personal property which had to be destroyed as a result of plutonium contamination (J.S. App. (II) 96a). Liability was asserted on alternative theories of negligence and strict liability (*id.* at 95a). The estate also requested $10 million in punitive damages (*id.* at 109a).[4]

Kerr-McGee asserted by way of defense that the Oklahoma workers' compensation statute barred a common law tort action (*id.* at 78a), and that "substantial compliance" with NRC regulations barred strict liabili-

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[3] The suit originally made allegations of a conspiracy in violation of 42 U.S.C. 1985(3) involving agents of Kerr-McGee and of the Federal Bureau of Investigation. The dismissal of those claims by the district court was affirmed in an earlier appeal. *Silkwood* v. *Kerr-McGee Corp.*, 637 F.2d 743 (10th Cir. 1980), cert denied, 454 U.S. 833 (1981).

[4] During the trial the estate moved to amend its complaint to seek $70 million in punitive damages, and the district court apparently granted the motion (J.S. App. (II) 109a).

ty, conclusively proved due care, and precluded punitive damages (*id.* at 57a). Kerr-McGee also denied any negligence, and claimed that Silkwood had taken the plutonium to her apartment and contaminated herself (*id.* at 96a).

The district court submitted the case to the jury on alternative grounds of strict liability and negligence (*id.* at 99a-101a). The jury was also instructed that it could award punitive damages "for the sake of example and by way of punishment, if [it found] * * * oppression, fraud, or malice, actual or presumed" (*id.* at 112a). The basis for punitive damages was explained thus (*ibid.*):

> [T]hey are allowed as a punishment to the offender for the general benefit of society, both as a restraint upon the transgressor and as a warning and example to deter the commission of like offenses in the future.

The jury was told that it could consider compliance with NRC regulations "to negative a finding of the conduct necessary to establish a basis for exemplary damages," but that it was "not bound by [those] standards" (*id.* at 102a):

> Your duty is to determine what constitutes the exercise of reasonable care in handling plutonium, or the existence of reckless and wanton conduct, in light of the physical characteristics of that material and the risks associated with it.

Ibid. The jury awarded actual damages of $505,000 and punitive damages of $10 million (*id.* at 42a-43a). Kerr-McGee's alternative motions for judgment notwithstanding the verdict and for a new trial were denied (*id.* at 42a-93a).

3. The court of appeals affirmed in part and reversed in part (J.S. App. 1a-40a). The court concluded that Silkwood's personal injury claim was work-related and that her exclusive remedy was therefore the Oklahoma workers' compensation scheme (*id.* at 3a-18a). That

scheme did not, however, apply to claims for property damage (*id.* at 18a). The court of apeals agreed that Oklahoma "would apply strict liability to this case of escape of plutonium, a highly toxic and dangerous substance" (*id.* at 20a), and that NRC regulations did not preclude application of strict liability under state tort law (*id.* at 18a-20a). It thus affirmed the $5,000 judgment for loss of personal property (*id.* at 20a-21a).

Finally, the court held that an award of punitive damages "competes substantially with the [NRC] in its regulation of radiation hazards associated with plants handling nuclear material" (*id.* at 24a). Punitive damages are, it said, granted for reasons of punishment and deterrence (*id.* at 22a). And "[a] judicial award of exemplary damages under state law as punishment for bad practices or to deter future practices involving exposure to radiation is no less intrusive than direct legislative acts of the state" (*id.* at 24a). The $10 million punitive damages verdict was reversed (*id.* at 24a).[5]

DISCUSSION

The court of appeals did not consider or discuss the Oklahoma statute whose invalidation is said to be the basis for this appeal. The case thus may not be within this Court's appellate jurisdiction under 28 U.S.C. 1254(2). Treated as a petition for certiorari, 28 U.S.C. 2103, the papers present no issue which warrants review. The questions presented have not been addressed by any other court of appeals, and were correctly decided in this case.

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[5] Judge Doyle concurred in upholding the $5,000 personal property award, but dissented from the court's holding that worker's compensation was the exclusive remedy for Silkwood's personal injury claim, and that punitive damages were preempted by the Atomic Energy Act (J.S. App. 25a-40a).

1. Appellant asserts that this case is within the Court's appellate jurisdiction under 28 U.S.C. 1254(2) because the court of appeals held Oklahoma's punitive damages statute (Okla. Stat. Ann. tit. 23, § 9 (West 1955)) invalid as applied to the circumstances of this lawsuit. In fact, the parties did not discuss the validity of the Oklahoma statute in the court of appeals, and the court of appeals did not mention it in its opinion. Thus the court's decision is consistent with a construction of the state law which would avoid the problem of invalidity, or with a conclusion that the district court acted improperly—under an admittedly valid statute—in instructing the jury on punitive damages. It is doubtful that Section 1254(2) authorizes an appeal under those conditions.

28 U.S.C. 1254(2) states that this Court may review cases in the courts of appeals "[b]y appeal by a party relying on a State statute *held* by a court of appeals *to be invalid* as repugnant to the Constitution * * * or laws of the United States" (emphasis added).[6] Section 1254(2) may be invoked where the court of appeals has held that a state law is invalid, not in all conceivable circumstances, but only as applied to the facts of the case.[7] On the other hand, appellate jurisdiction does not lie where the court has merely construed a state statute

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[6] The holding of invalidity contemplated by Section 1254(2) encompasses determinations that the state law is preempted by a federal statute. *Minnesota* v. *Northern States Power Co.*, 405 U.S. 1035 (1972), aff'g 447 F.2d 1143 (8th Cir. 1971).

[7] See *Malone* v. *White Motor Corp.*, 435 U.S. 497, 499 (1978); *Dutton* v. *Evans*, 400 U.S. 74, 76 n.6 (1970); *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, 491-492 (1958).

in a manner that avoids questions about its validity.[8] So too "an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification."[9]

The difficulty of distinguishing among these theories, coupled with the principle that statutes conferring appellate jurisdiction on this Court will be narrowly construed,[10] explains the rule that appeals may not be taken from cases where invalidation of the state statute is not a clear or necessary predicate for the court of appeals' decision.[11] In this case the opinion of the court of

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[8] C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4037, at 47-48 (1978); cf. *United States* v. *Christian Echoes National Ministry, Inc.*, 404 U.S. 561, 565 (1972) (28 U.S.C. 1252) ("The court avoided holding that the section itself was unconstitutional 'as applied' * * *. Rather, it held that * * * the section must be narrowly construed."); *Hopkins Federal Savings & Loan Association* v. *Cleary*, 296 U.S. 315, 332 n.4 (1935) (Judicial Code, ch. 229, Section 237(a), 43 Stat. 937, as amended, 28 U.S.C. 1257). This Court noted the close parallel in construction of Sections 1254(2) and 1257 in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 675-677 n.11 (1974).

[9] *Phillips* v. *United States*, 312 U.S. 246, 252 (1941) (28 U.S.C. (1940 ed.) 380, as amended, 28 U.S.C. 1253); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 562-563 n.4 (1980) (28 U.S.C. 1257(2)).

[10] See *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (28 U.S.C. 1254(2)).

[11] See, e.g., *Minnesota* v. *Alexander*, 430 U.S. 977 (1977) (28 U.S.C. 1254(2)); *id.* at 978 n.1 (Stevens, J., dissenting) ("It is arguable, of course, that our mandatory appellate jurisdiction is defeated by the Court of Appeals' failure to make express its invalidation of the statute as applied to the Corps"); cf. *Kulko* v. *California Superior Court*, 436 U.S. 84, 90 n.4 (1978) (28 U.S.C. 1257(2)) ("The opinion below does not purport to determine the constitutionality of the California jurisdictional statute. Rather, the question decided was whether the Constitution itself would permit the assertion of jurisdiction."); *United States* v. *Christian Echoes National Ministry, Inc.*, *supra*, 404

appeals does not even mention Okla. Stat. Ann. tit. 23, § 9— the statute that appellant contends was held unconstitutional. Neither did the briefs filed by the parties in the court of appeals contest or defend the constitutionality of § 9. Appellees, who disputed the punitive damages awarded by the district court, argued instead that compliance with federal regulations negated the state of mind required for punitive damages, and that such damages—because they amounted to regulation—would impermissibly control conduct that was to be governed exclusively by the Nuclear Regulatory Commission. No. 79-1894 Defendants-Appellants Br. 61-64. Both contentions are consistent with a conclusion that, for the reasons advanced by appellees, the Oklahoma punitive damages statute should not be read to cover this case. Appellant in the portion of his brief responding to those arguments, like the court of appeals, did not mention the Oklahoma law. No. 79-1894 Plaintiff-Appellee Br. 49-54. Moreover, we are informed by counsel for the parties that no certification was made to the Oklahoma attorney general that the constitutionality of the Oklahoma punitive damages law had been drawn in question. See 28 U.S.C. 2403(b).[12]

U.S. at 563-564 (28 U.S.C. 1252) ("The court did not * * * even consider the constitutionality of § 501(c)(3) 'as a whole.' Nor does any part of its opinion hold that the section was unconstitutional 'as applied.'").

In *California* v. *Grace Brethren Church*, No. 81-31 (June 18, 1982), this Court held that an appeal under 28 U.S.C. 1252 was proper even though the district court had not expressly held 26 U.S.C. 3309(b) unconstitutional as applied to certain religious schools. In contrast to this case, however, the determination of unconstitutionality "'was a necessary predicate to the relief'" granted by the district court. Slip op. 11, quoting *United States* v. *Clark*, 445 U.S. 23, 26 n.2 (1980). The district court *had* expressly held unconstitutional the state unemployment tax, which was adopted to comply with Section 3309. Slip op. 12.

[12] The court of appeals did, of course, speak unambiguously of "preemption" of punitive damages by the Atomic Energy Act. See J.S. App. 21a-24a. But neither the majority *(ibid.)* nor the

What is more, Oklahoma's punitive damages provision is nothing more than a "legislative recognition [of] a common law rule of long standing and acceptance." *Symposium on the Oklahoma Law of Damages*, 6 Okla. L. Rev. 289, 293 (1953). It is part of a codification that restates rules of damages law in the most general terms.[13] The state's courts exercise considerable freedom in interpreting such rules, much as they would the common law which the rules embody. In *Nixon* v. *Oklahoma City*, 555 P.2d 1283 (1976), the Oklahoma Supreme Court held that punitive damages could not be recovered against a municipality because the public had "little direct control" over its agents, and the deterrent effect of such damages was consequently minimal. *Id.* at 1285. "If no social benefit is to be derived from the imposition of exemplary damages, all legal justification for the award collapses" (*ibid.*). The court did not mention Okla. Stat. Ann. tit. 23, § 9 in its opinion.

It is difficult to say whether Oklahoma's courts would find that punitive damages could be awarded in the circumstances of this case. They might conclude, for example, that the "legal justification for the award" was

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dissent (*id.* at 32a-40a) cited any Oklahoma case or statute which might define the circumstances under which Oklahoma allows awards of punitive damages. Instead, the issue addressed by both was whether such awards as a matter of general common law are precluded by the Act. See, e.g., *id.* at 24a ("A judicial award of exemplary damages under state law * * * is no less intrusive than direct legislative acts of the state"); *id.* at 34a ("the issue [is] whether a civil action * * * is subject to preemption"). The conclusion that they are casts no light on whether the common law of Oklahoma, or its statutory embodiment, would require state (and federal diversity) courts to award them anyway.

[13] See, e.g., Okla. Ann. Stat. tit. 23, § 3 (West 1955) ("Any person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages").

superfluous in light of the criminal and civil penalties which federal law may impose on licensees of plutonium processing and fuel fabrication facilities.[14] Alternatively, they might decide that compliance with federal regulations negates as a matter of state law the state of mind required by § 9. It is also possible that they would conclude, as appellees have contended (Motion to Dismiss or Affirm 18-19), that punitive damages may not be recovered where the plaintiff's action for compensatory damages has been replaced by the workers' compensation law. See Okla. Stat. Ann. tit. 85, §§ 11-12 (West 1970 & Supp. 1981-1982).[15] None of those questions was addressed by the court of appeals, though it should surely have done so before holding that the state's statute unconstitutionally invaded the province of federal law.

Accordingly, it is not clear that Oklahoma's punitive damages law was "held by [the] court of appeals to be invalid" (28 U.S.C. 1254(2)); had the court addressed § 9 directly, it might simply have found it inapplicable. In these circumstances, it may be appropriate to dismiss the appeal for want of jurisdiction.

2. Treated as a petition for a writ of certiorari, 28 U.S.C. 2103, the papers in this case do not present an issue worthy of review by this Court. As appellant and amici the State of Nevada et al. (Amicus Br. 12) recog-

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[14] See pages 13-14, *infra*.

[15] This uncertainty about the bounds of common law principles explains in part the limitation put on appeals by 28 U.S.C. 1254(2): it provides mandatory review when a state statute is held invalid, but not when state common law is displaced. It is not clear whether a state may finesse the distinction by making a statutory declaration of common law, as Oklahoma has in its damages statute. Cf. J.S. 17-22 ("The Decision Below Violated the Standards Respecting Preemption of Common-Law Rights Recognized by This Court."). But the Court need not address that question in this case, since the court of appeals did not consider the coverage of Okla. Stat. Ann. tit. 23, § 9.

nize, "[t]his is the first case involving nuclear power in which punitive damages have been awarded by a jury" (J.S. 13). If the issue of punitive damages is one which may arise with some frequency in the future, and if (contrary to the government's belief) the question of preemption was decided incorrectly in this case, a resolution by this Court should await more mature consideration by other courts of appeals. None of the 13 states (except New Mexico) filing as amici is located within the Tenth Circuit. Each will thus have an opportunity to address the question anew, either as amicus or—if a state statute like Minnesota's (Minn. Stat. Ann. § 549.20 (West Supp. 1982)) should be drawn in question—as an intervening party. See 28 U.S.C. 2403; Fed. R. Civ. P. 24(b). Moreover, the court of appeals' decision explicitly declares that state law—including rules of strict liability—is to govern all questions of compensation for personal injuries and property damage arising from incidents short of an "extraordinary nuclear occurrence" (J.S. App. 19a-20a, quoting 42 U.S.C. 2210(n)).[16] Thus the only state interest affected by the decision is the interest in independently punishing and deterring, by discretionary jury awards of punitive damages, activities already subject to strict control by the NRC.

3. The court of appeals was clearly correct in holding that punitive damages may not be awarded in the circumstances of this case. The Atomic Energy Act explicitly precludes state regulation of plutonium processing facilities "for purposes [of] protection against radiation hazards." 42 U.S.C. 2021(k). The NRC has implemented through regulations its statutory duty to provide such protection. Punitive damages were awarded

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[16] Only because Oklahoma would apply its workers' compensation law to appellant's personal injury claim did the court reverse the award of $500,000 damages for those injuries (J.S. App. 3a-18a).

in this case, at the instruction of the trial judge, for the explicit purpose of affording that same protection. Nothing in the Price-Anderson Act, 42 U.S.C. 2210, authorizes such an award despite its inconsistency with the Atomic Energy Act.

a. Section 274(k) of the Atomic Energy Act of 1954, 42 U.S.C. 2021(k), provides:

> Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

In *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143 (1971), the Eighth Circuit held invalid an effort by the Minnesota Pollution Control Agency to regulate by permit the level of radioactive liquid and gaseous discharges from Northern States' nuclear power plant, and to require monitoring programs for the detection of such releases. The court of appeals found in Section 274(k) a declaration that "the federal government possessed exclusive authority over radiation hazards" (447 F.2d at 1150). This Court summarily affirmed. 405 U.S. 1035 (1972). Other courts have come to the same conclusion. *People of Illinois* v. *General Electric Co.*, 683 F.2d 206, 215 (7th Cir. 1982), petition for cert. pending, No. 82-648 (filed Oct. 12, 1982); *Washington State Building & Construction Trades Council* v. *Spellman*, 684 F.2d 627, 630 (9th Cir. 1982).

The authority which Section 274(k) says is withheld from the states is given by the Act to the NRC. Congress gave the Commission power "to govern the possession and use of special nuclear material,"[17] and to "govern[] the design, location, and operation of facilities" that use such material "in order to protect health and to minimize danger to life or property * * *." 42

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[17] "Special nuclear material" includes plutonium. 42 U.S.C. 2014(aa).

U.S.C. 2201(b) and (i)(3). Licenses for use and transfer of plutonium and for the operation of production facilities require compliance with Commission "safety standards * * * to protect health and to minimize danger to life or property * * *." 42 U.S.C. (& Supp. IV) 2073(e)(7), 2077, 2133(b). As this Court noted in its first decision involving the licensing provisions of the Act, "the responsibility for safeguarding [the] health and safety [of the public] belongs under the statute to the Commission." *Power Reactor Development Co.* v. *International Union of Electricians*, 367 U.S. 396, 404 (1961).

The NRC has promulgated detailed regulations implementing its responsibilities under the Act, 10 C.F.R. Parts 0-170, including requirements which plants like Kerr-McGee must observe for protection against radiation. 10 C.F.R. Part 20. Under these standards, licensees must not only comply with specific exposure limits, but "should * * * make every reasonable effort to maintain radiation exposures * * * as low as is reasonably achievable." 10 C.F.R. 20.1(c).

Violations of the Atomic Energy Act and the regulations enforcing it are subject to strict criminal and civil penalties. 42 U.S.C. (& Supp. IV) 2271-2284. Criminal conviction for willful violations of various provisions of the Act may result in substantial fines and imprisonment. 42 U.S.C. (& Supp. IV) 2272-2279, 2283-2284. The Attorney General may seek injunctive relief to prevent or stop violations of the Act or NRC regulations or orders. 42 U.S.C. 2280. Finally, the NRC itself can impose civil penalties for violations of specific licensing provisions of the Act. 42 U.S.C. (& Supp. IV) 2282. In 1980 Congress increased the maximum civil penalty to $100,000 per violation; if the violation is a continuing one, each day constitutes a separate violation. 42 U.S.C. (Supp. IV) 2282(a). Finally the NRC can initiate proceedings to modify, suspend, or revoke any license

issued under the Act, and in an emergency, can make such action effective immediately. 10 C.F.R. 2.201, 2.202, 2.206; see *id.*, Section 70.61-70.62.

b. Rather than permit the award of punitive damages, the state of Oklahoma might in this case have attempted to conduct its own investigation of the operation of appellee's plant after learning that Silkwood had been contaminated with plutonium. On the basis of such an investigation, a state agency might have determined that appellees had recklessly and wantonly violated state regulations governing the operation of their plant, and thereby permitted the diversion of plutonium. If on the basis of such an investigation and determination a state agency had levied against appellees a $10 million fine, there is no doubt that its action would be preempted by the Atomic Energy Act.

In this case the district court instructed the jury that under state law it should make its own determination of "what constitutes the exercise of reasonable care in handling plutonium, or the existence of reckless and wanton conduct, in light of the physical characteristics of that material and the risks associated with it" (J.S. App. (II) 102a; see *id.* at 72a). If the jury concluded that appellees' conduct did not satisfy the standards the jury would prescribe, it was permitted to award punitive damages "as a punishment to [appellees] for the general benefit of society" and to restrain and deter similar offenses (*id.* at 112a). Like a civil fine, the award of $10 million punitive damages here directly conflicts with the exclusive authority given the NRC to regulate the health and safety hazards associated with plutonium and production facilities.

c. The Price-Anderson Act, 42 U.S.C. 2210, is relevant to the issue of liability for nuclear accidents in several ways. It requires NRC licensees to purchase private insurance, creates a government indemnity fund, and sets a ceiling on liability for substantial nuclear ac-

cidents.[18] In the case of such accidents the Act also requires those indemnified to waive all legal defenses. 42 U.S.C. 2210(n). Otherwise, questions of liability are assumed to be governed by state tort law. S. Rep. No. 1605, 89th Cong., 2d Sess. 6-10 (1966); see *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 65-66 (1978). The legislative history of the Act gives no indication that Congress considered punitive damages an appropriate state law remedy, given their inconsistency with other provisions in the Atomic Energy Act.

The court of appeals noted—correctly, we believe—that punitive damages are also inconsisent with the Price-Anderson Act's limitation of liability for substantial nuclear accidents (J.S. App. 22a), a point which suggests their unavailability for lesser incidents as well. Appellant disputes that assertion (J.S. 22-24), relying chiefly on the rejection of an Atomic Energy Commission proposal that the government not be liable "for loss or damage caused by bad faith, willful misconduct or gross negligence" on the part of the licensee. *Governmental Indemnity: Hearings Before the Joint Comm. on Atomic Energy*, 84th Cong., 2d Sess. 44 (1956). But the suggestion was rejected not in order to allow punitive damages, but in order to assure compensation in all cases. "[T]he damage to the public is the same, whether caused by any means—willful or nonwillful." S. Rep. No. 296, 85th Cong., 1st Sess. 18 (1957).[19]

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[18] The Price-Anderson Act leaves to the discretion of the NRC the decision whether to impose the financial protection and indemnification provisions on various classes of licensees. 42 U.S.C. 2210(a). The NRC did not extend those requirements to plutonium processing and fuel fabrication plants until after the events giving rise to this case. 42 Fed. Reg. 46 (1977); 10 C.F.R. 140.2(a)(3), 140.13a, 140.20(a) and (f)(1)(ii).

[19] The only specific reference to punitive damages in the legislative history of the Price-Anderson Act of which we are aware was made by Professor David Cavers in a law review ar-

4. Appellant's contention that the denial of punitive damages violates due process and equal protection (J.S. 24-29) is frivolous. As this Court recognized in *Duke Power Co.*, *supra*, 438 U.S. at 84, the only question regarding such claims is whether Congress's decision to preclude punitive damages "is demonstrably arbitrary or irrational." It clearly is not. Congress merely substi-

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ticle attached as appendix 39 to the *Proposed Extension of AEC Indemnity Legislation: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 89th Cong., 1st Sess. 415-416 (1965). Professor Cavers noted the possibility that punitive damages might be imposed under various state laws against a nuclear incident defendant. *Id.* at 415. He recommended that "[t]o avoid this, recovery of punitive damages should be denied in all nuclear cases, except perhaps a case against a wrongdoing individual, who, as to these damages, should not be protected by the operator's insurance or indemnity." *Id.* at 416. In his testimony before the Joint Committee, neither Professor Cavers nor Committee members referred to the issue of punitive damages. *Id.* at 211-223.

The NRC has specified conditions for the waiver of defenses, to be included in indemnity agreements and insurance policies, for claims arising from an extraordinary nuclear occurrence. 10 C.F.R. Part 140. For example, the Waiver of Defenses Endorsement (Extraordinary Nuclear Occurrence) to the Nuclear Energy Liability Policy provides that the companies agree to waive any defenses related to fault, including negligence. 10 C.F.R. 140.91 App. A, para. 1, at 730.

This Endorsement does not apply to punitive damages claims with one exception. In states where only punitive damages are allowed for wrongful death, defenses to punitive damages claims are waived to the extent of actual pecuniary losses. Waivers Endorsement, *supra*, 10 C.F.R. 140.91 App. A, para. 2(c), at 730. The purpose of these provisions "is to assure compensation for injury or damage from an extraordinary nuclear occurrence." 33 Fed. Reg. 6982 (1968).

Although these provisions contemplate that licensees might be sued for punitive damages, they do not indicate the appropriate outcome of such claims. Licensees are permitted to raise all defenses against such claims, including the defense that punitive damages are preempted by the Atomic Energy Act.

tuted for one means of controlling licensees' conduct (a means subject to the whims of a jury), another method implemented by the NRC. Plaintiffs who are the incidental beneficiaries of juries' discretionary punitive awards have no right under Oklahoma law to exemplary damages, see *Amoco Pipeline Co.* v. *Montgomery*, 487 F. Supp. 1268, 1272 (W.D. Okla. 1980), even in order to pay the expenses of litigation. *Cox* v. *Theus*, 567 P.2d 447, 450 (Okla. 1977). They may still receive compensation for harmful licensee misconduct, either under workers' compensation or, in a proper case, in the form of compensatory damages (J.S. App. 3a-21a).

CONCLUSION

Should the Court conclude that it has jurisdiction of the appeal, the judgment of the court of appeals should be affirmed. Alternatively, the appeal should be dismissed and the papers treated as a petition for a writ of certiorari, and the petition should be denied.

Respectfully submitted.

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No. 81-2159

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

BILL M. SILKWOOD, Administrator of the Estate of
KAREN G. SILKWOOD, Deceased,
Appellant,

versus

THE KERR-McGEE CORPORATION,
a Delaware Corporation, and
THE KERR-McGEE NUCLEAR CORPORATION,
a Delaware Corporation,
Appellees.

On Appeal from the United States Court of
Appeals for the Tenth Circuit

APPELLANT'S BRIEF IN RESPONSE TO BRIEF OF SOLICITOR GENERAL AND IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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No. 81-2159

In The

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versus

THE KERR-McGEE CORPORATION,
a Delaware Corporation, and
THE KERR-McGEE NUCLEAR CORPORATION,
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Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

APPELLANT'S BRIEF IN RESPONSE TO BRIEF OF SOLICITOR GENERAL AND IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

Bill M. Silkwood, as administrator of the Estate of Karen G. Silkwood, deceased, submits the following in response to the Brief filed by the Solicitor

General of the United States. To the extent that the Solicitor General has adopted or advanced arguments similar to those of the Appellees, this brief also constitutes a Brief in Opposition to the Appellees' Motion to Dismiss or Affirm.

The Solicitor General argues that this case is not appealable because the Tenth Circuit did not specifically discuss Oklahoma's statute and because the Circuit could have overturned the jury's punitive award on other, non-preemption grounds.

These arguments are specious. Appellant's right to a direct appeal is determined by what the Circuit did rule - not what it could have ruled. What it did was to ignore the proper preemption standards and to preempt a pre-existing statutory tort remedy despite Congress' expressed intention that state tort law is to control.

Thirteen states have joined as amici with appellant in asking this Court to take jurisdiction over this case and to overturn the Circuit's unwarranted, incorrect and unjust decision. Those states recognize the far-reaching national and troublesome implications of the decision - a fact which calls for a fully considered decision on the merits by this Court even if it were to consider review of the case on the basis of certiorari rather than direct appeal.

Appellant contends that this is a proper appeal under 28 U.S.C. §1254(2) and even if treated as a petition for certiorari under 28 U.S.C. §2103, this case requires the Court's review.

I.

ARGUMENT

At the outset, it is essential that a series of errors contained in the brief of the Solicitor General be corrected since the foundation upon which the Solicitor General has constructed its position rests on an apparent misunderstanding or mischaracterization of this case.

A. CONSTITUTIONALITY WAS PRESENTED TO COURT OF APPEALS

First, the Solicitor General states "Neither did the briefs filed by the parties in the court of appeals contest or defend the constitutionality of §9." (S.G. Br.8) This simply is not true. Appellant's brief initially cited 23 O.S. §9 as the basis for punitive damages in the case, (Plaintiff-Appellee Br.2), extensively discussed the interpretation of the elements of the statute in Oklahoma cases (ibid. 67-73), and asserted that as a case involving State tort principles that preceded the adoption of the preemptive federal statute, the constitutional standard of Nader v. Allegheny Airlines, 426 U.S. 290 (1976) applied[1], rather than Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th CIR 1971), affd. mem. 405 U.S. 1035 (1972). (Plaintiff-Appellees Br. 45)

In the Supplemental Memorandum of Plaintiff-Appellee we further urged the adoption of the Nader

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[1] Nader held that the preexisting right must be "so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy, in other words render it nugatory." 426 U.S. at 298.

Constitutional Standard. (Plaintiff-Appellee's Supp. Mem.3-6). Appellant squarely placed the Constitutionality of §9 before the court of appeals.

B. STATUTE WAS CONSIDERED BY COURT OF APPEALS

Second, the Solicitor General argues that since the majority opinion did not cite the statute in question, it must not have considered the constitutionality of the statute. This attempts to elevate poor craftsmanship to a determinant of the right to a direct appeal. In Oklahoma punitive damages are statutory, and statutory alone. The Appellee acknowledged this in its Brief below, (Defendants-Appellants' Br.60) as does the Solicitor General. (S.G. Br.10, n.15) There is no common law action for punitive damages in Oklahoma. Barnes v. McKinney, 589 P.2d 698,700n.1 (OK.App.1978), Gilbreath v. Phillips Petroleum Co., 526 F.Supp. 657,659 (W.D. OK.1980).

The Solicitor General cites Nixon v. Oklahoma City, 555 P.2d 1283 (OK.1976), which omits mention of 23 O.S. §9 but unmistakably interprets it. The Court recognized that the persons punished by an award of punitive damages against a municipality would be the taxpaying public rather than "the agents over which it is able to exercise but little control"; and it is the public to be benefitted by the imposition of punitives. Thus, the Court reasoned the direction of §9 that punitives are to be awarded when the transgressor "has been guilty of oppression, fraud or malice . . . by way of punishing the defendant" would therefore not be met with a municipal defendant - a consideration inapposite in this case.

The Solicitor General concedes that where the determination of unconstitutionality is a "necessary

predicate to relief" an appeal is proper even though the court below did not expressly hold a statute unconstitutional. (S.G. Br.8,n.11) This is exactly such a case - where the only source is statutory, the preemption of punitive damages under the Supremacy Clause unavoidably required a holding that the state statute as applied is repugnant to the United States Constitution or laws within the meaning of 28 U.S.C. §1254(2).

C. "FINESSING" (1254(2))

Third, while the brief of the Solicitor General correctly observes that a §1254(2) appeal provides for a mandatory review where a state statute is invalid, but not where a common law right is abrogated, it expresses doubt that a "state may finesse the [statutory vs. common law] distinction by making a statutory declaration of common law." (Br.10,n.15) Since the Oklahoma punitive statute was adopted in its present form by the First Territorial Legislature in 1890, St.1890 §2619, just how Oklahoma had "finessed" this distinction remains obscure. This Court recognized the pre-existing nature of state tort remedies in Duke Power v. Carolina Environmental Study Group 438 U.S. 59,88,n.33 (1978):

> "Appellees' only right prior to the enactment of the Price-Anderson Act was to utilize their existing common law and state law [i.e. statutory] remedies to vindicate any particular harm visited on them from whatever sources." (emphasis added)

Indeed, this pre-existing status mandates the application of Nader and produces the due process and equal protection dimensions of this case. Under

Nader, there should be a strong presumption against nullification of one existing state tort law, and no preemption absent an unmistakable Congressional intent to preempt. The inconsistency of the Circuit's analysis with the proper standards recognized by this Court in Nader demands review by this Court. Moreover, the pre-existing nature of punitive damages clearly distinguishes this case from Northern States which involved the adoption of a competing regulatory scheme long after the federal system was in place and the direct clash of highly technical standards, rather than the application of a long-standing general punitive damage statute in a private lawsuit.

D. AVOIDING THE CONSTITUTIONAL CONTROVERSY

Fourth, the Solicitor General asserts that the statute was not necessarily passed upon by the court of appeals since it might have interpreted the statute as not justifying punitive damages. This argument is transparently hollow. It ignores the deference which must be given to the jury's determination and the trial court's concurrence. The Circuit, in fact, did not overturn the punitive award on other non-preemption grounds. Moreover, the clear duty of the court of appeals was to avoid constitutional issues unnecessary to resolve the rights of the parties, especially where statutory or factual issues exist. Blum v. Bacon ___U.S.___, 102 S.Ct. 2355,2359 (1981), Gulf Oil Co. v. Bernard 452 U.S. 89 (1981). Appellee placed a number of statutory and factual issues - including those presented in Appellee's brief to this Court - before the court of appeals. The appeals court could have resolved any of these in Appellee's favor, but did not, as the Solicitor General recognizes:

> "None of those [non-federal] questions was addressed by the court of appeals, though it should surely have done so before holding that the state statute unconstitutionally invaded the province of federal law." (S.G. Br.10)

The Solicitor General's bench memo does not demonstrate the absence of a right to a direct appeal - it merely urges other unmeritorious grounds upon which this Court might uphold the Circuit. These arguments cannot undo the fact that given the well-entrenched rule that constitutional issues are to be decided only as a last resort, the Circuit necessarily determined that the other grounds asserted for reversal were unmeritorious. Beside, the Circuit did, as the Solicitor General has to acknowledge, "speak unmistakably of 'preemption of punitive damages by the Atomic Energy Act'" (S.G. Br.8,n.12).

The other arguments which the Solicitor General discusses at length are thus first, irrelevant because they were not what the Circuit did decide, and second, are in fact unmeritorious.

I

The Solicitor General opines that since the plaintiff's action for compensatory damages has been replaced by the worker's compensation law, the courts might conclude that punitive damages may not be covered. (S.G. Br.10) The Solicitor General obviously overlooks its own acknowledgment that the $5,000 personal property damage award was upheld by the court of appeals. (S.G. Br.5,n.5). In Oklahoma, a property damage cause of action will support punitive damages. State, ex rel. Pollution, etc. v. Kerr-McGee Corporation, 619 P.2d 858 (OK.1980), Garland Coal v.

Few, 267 F.2d 785 (10th CIR 1959). This property damage award would by itself support punitive damages in a substantial amount.[2]

II

Additionally, the question of Appellee's liability for the personal injuries suffered by Karen Silkwood is by no means finally resolved, as suggested in Appellant's Jurisdictional Statement at page 6, note 5.

Under Oklahoma law, an employee who is intentionally or willfully injured by his or her employer is entitled to sue for such injuries in a common law action as if the Workers' Compensation Law did not exist. Hull v. Wolfe, 393 P.2d 491,493 (OK.1964).

The trial court limited the introduction of evidence by Appellant which would go to establishing an intentional or willful contamination by Appellees because of the court's ruling that the case was not subject to the Workers' Compensation courts and because Appellant also had theories of negligence and

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[2] Appellees' assertion that a 20-to-1 ratio between the actual damages and the punitive damages awarded by the jury was per se excessive was rejected in the trial court's opinion [see, Silkwood v. Kerr-McGee Corp., 485 F.Supp. 566,589-591 (1979)] and not reached by the Tenth Circuit. Appellant's ratio argument has been expressly rejected by the Oklahoma courts--see, Timmons v. Royal Globe Ins. Co., 53 OBAJ 1898 (OK. August 7, 1982)--upholding a punitive award 44 times an actual award. Thus, using Appellees' own peculiar legal calculus, a punitive damage award of at least $220,000 with actual damage of even $5,000 would not be per se excessive.

gross negligence. As one example, the court limited evidence as to anti-union attitudes by Appellees' plant manager. See tr. 7624. Appellant's trial strategies, evidence, jury arguments and requested instructions were all formulated and presented in reliance on the court's rulings. See, e.g., tr. 10,641.

If the jury's determinations are not sufficient by themselves tc establish an entitlement to recovery on a Hull v. Wolfe type of common law cause of action, Appellant may still be entitled to a new trial on the issue of an intentional or willful contamination. The trial court recognized that there was a common law right of action for an intentional contamination. See tr. 1068.

Thus, the issue of Appellant's entitlement to punitive damages is by no means moot. There is an actual damage award as well as a jury determination that Appellant had the degree ot culpability necessary for a large punitive damage award, and the trial court concurred when it refused to set aside or alter the jury's verdict. See, 485 F.Supp. at 591.

III

The Solicitor General also speculates that Oklahoma courts might decide that the Appellee's compliance with federal regulations negates as a matter of state law the state of mind required by §9. (S.G. Br.10). As we amply demonstrated in our brief below, the Appellee was not in compliance with applicable federal regulations. Plaintiff-Appellee's Br.98-102, Plaintiff-Appellee's Supp. Mem. 12,n.19. The presence of clear and convincing proof in the trial record of such non-compliance amply explains why the court of appeals did not reverse the punitive award in this

case on that ground rather than reaching the constitutional issue.

Moreover, Oklahoma law has never acknowledged the "compliance" defense asserted by Appellees. As to negligence, Oklahoma follows the almost universal rule that compliance with statutory or administrative requirements does not preclude a finding of negligence, but is merely evidence of use of due care. Transport Indemnity Company v. Page, 406 P.2d 980 (OK.1965); McBroom v. Mayer, 303 P.2d 303 (OK.1956); Kansas O&G Ry. Co. v. Clark, 262 P.426 (OK.1903). Where the common law standard of due care greatly exceeds the administrative minimum, as here, Oklahoma law would not bar punitives where conscious indifference to the consequences of an act or reckless disregard of the rights of the injured was demonstrated. Thus, the court of appeals was fully justified in rejecting Appellees' factual and statutory defenses and moving to decide the constitutional question - which it undoubtedly did.

E. NRC LICENSING

Fifth, defending the decision below, the Solicitor General emphasizes a purported strict control exercised by the Nuclear Regulatory Commission over the activities of licenses such as Appellee. Apparently, it is this comprehensive regulation of nuclear power that mandates the preemption of punitive damages, although the Solicitor General tenders no actual constitutional test comparable to the court of appeals "substantially competes"; rather, the brief of the Solicitor General mechanically applies Northern States in a manner utilized in an "occupation of the field" preemption analysis. This is not an occupation of the field case. The Circuit's upholding of

the property damage verdict demonstrated that the AEC Act has not occupied the field of tort recovery. And, as the record in this case demonstrated, the comprehensive and strict regulating of Appellees' plutonium fuel fabrication facility was largely illusory. As NRC Regional Director James Keppler testified:

> ". . our experience is that it is not equating compliance to safety - it is not a 100% guarantee, if you will. Our experience is that licenses are deficient in certain areas. It is hard to foresee all the conditions that may exist that you might want a license condition to touch on." (App.1511)

Keppler also testified that small, but biologically significant, quantities of plutonium could escape from the plant and yet no license conditions be violated since they were directed at the removal of strategic amounts.[3]

Perhaps the most compelling example of a regulatory gap[4] was that despite the necessity for a thorough and systematic dismantling of Karen Silkwood's apartment by workers in protective clothing and respirators in a month-long operation and the confiscation and storage in large drums of virtually

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[3] In other parts of his testimony, Keppler restated that compliance with the conditions of the license was no guarantee of safety (App.1527) and that the regulations reflected minimum standards. (App.1523)

[4] For another regulatory gap in Appellee's license see J.S. 8,n.13 and App. 1518.

all of her personal possessions, Appellee was not cited by the NRC for violation of any significant regulatory standards.[5]

F. DUE PROCESS AND EQUAL PROTECTION

Sixth, viewing the "only question regarding such [equal protection and due process] claims is whether Congress' decision to preclude punitive damages 'is demonstrably arbitrary and irrational'", the Solicitor General characterizes Appellant's constitutional arguments as frivolous. (S.G. Br.16). However, Duke Power compels an additional question: May Congress abolish a pre-existing statutory right of a state citizen to certain remedies to vindicate his interests without providing a reasonably just substitute? In Duke Power the Court invoked the waiver of defenses provisions of the Price-Anderson Act as providing a quid pro quo in exchange for the exceedingly remote possibility that damages could exceed the $560 million ceiling. In this case, not only was Appellant left to his own devices under State law for this sub-threshold nuclear incident, the NRC did not extend the financial protection and indemnifications for an extraordinary nuclear occurrence to the Appellees' plutonium processing and fabrication facility until

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[5] The only regulatory standards related to the escape of biologically significant amounts of plutonium off-site is for maximum permissible air concentration (10 CFR §20.106(a)(1974)) and for external radiation (10 CFR §20.105(b)) in an "unrestricted area". The air regulations allow the concentration to be averaged over a full-year so that the regulation obviously is not designed to cover a one-time off-site contamination. External radiation regulations have scant application since plutonium, as an alpha emitter, imposes a threat from inhalation and ingestion, not external radiation.

after the events giving rise to plaintiff's cause of action (S.G. Br.15,n.18). Thus, those protections relied upon in Duke Power are wholly absent in this case.

The Solicitor General makes light of Appellant's entitlement to punitives by emphasizing that they are a windfall to the suing party and are designed for protection of the society as a whole. The Societally-protective feature is undeniable, yet the law gives a suing party an entitlement to a jury's consideration of punitives and to the jury's award if the statutory requisites are met. The statutory requirements were met here and there was an ample evidentiary basis for the award - a fact which even the Circuit did not dispute. Under Oklahoma law, it is error for a court to deny punitive damages to a party which has met the statutory requirements. Thus, Appellant has been deprived of damages which he had a statutory right to. And, if this right can be nullified by an appellate court on general public policy grounds, Appellant has been denied the verdict properly rendered by a conscientious jury after a long trial - in effect a nullification of Appellant's right to a jury trial. Substantial constitutional issues were raised by the decision below - issues which must be resolved by the Court in this case.

II.

WHY THE COURT SHOULD ACCEPT THIS CASE FOR REVIEW

The Solicitor General urges the Court to decline to review the decision of the court of appeals in this case on the basis that, on one hand, the court of appeals decision is correct, and, on the other, if the court of appeals erred, the Court should await "a more mature consideration by other courts of appeal." (S.G. Br.11)

The issue before the Court at this stage is merely whether the Court should exercise its plenary power and allow Appellant to file a brief and argue the case. The excellent brief of the Amici States amply confirms the importance of this case and outlines the manifest error committed by the court of appeals. In the brief of the Solicitor General, the same flawed analysis displayed by the majority of the court of appeals panel is to be found.

A. PUNITIVE DAMAGES ARE RECOVERABLE UNDER THE PRICE-ANDERSON ACT

Of particular note is the assertion by the Solicitor General that no punitive damages are recoverable under the Price-Anderson Act and hence, allowing them in sub-threshold cases would be inconsistent with the Atomic Energy Act and must be preempted. A short review of the development of the relevant statutes establishes that the Solicitor General is simply wrong.

When the Atomic Energy Act was adopted in 1954, it contained no reference to liability or indemnity. Over the next few years it was determined that uncertainty over the potential exposure to financial risk presented an impediment to the private sector development of atomic energy. AEC Staff Study of the Price-Anderson Act, Selected Materials on Atomic Energy Indemnity and Insurance Legislation, Joint Committee on Atomic Energy, p.2-3 (1965).

When the Price-Anderson Act was adopted in 1957, all questions of liability for nuclear incidents were to be determined according to state law.

S.Rep. No.296, 1957 U.S. Code, Cong. & Admin. News, 1803, 1810 (1957).[6]

In response to questions raised concerning the "responsibilities and regulatory powers of State and local governments", in 1959 Congress enacted Section 274 of the Atomic Energy Act. Selected Materials on Federal-State Cooperation in the Atomic Energy Field, Joint Committee on Atomic Energy, p.1 (1959). The text and legislative history of this amendment relate solely to attempts by the states to directly regulate by comprehensive safety standards enforced by an administrative agency those nuclear facilities already being regulated by the Atomic Energy Commission. ibid, pp.5,151-239. The 1959 Act did not purport to affect in any way the provisions of the 1957 Price-Anderson Act - which had left all questions of liability for acts by licensees to state tort law.

As the 10-year life of the Price-Anderson Act ebbed, commentators began to express concern that certain state tort principles might bar recovery in some states, while not in others. Professor David Cavers raised a number of such issues and proposed the adoption of a new federal tort statute which would resolve any uncertainties. (S.G. Br.15,n.19) As the Solicitor General states, Professor Cavers noted in his article that some states might impose punitive damages against a nuclear incident defendant and recommended that "to avoid this, recovery should be denied in all nuclear cases..." (emphasis added).

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[6] For a full recitation of relevant legislative history of the Price-Anderson Act see Addendum A to Plaintiff-Appellees' Petition for Rehearing and Suggestion for Rehearing in Banc, J.S. App.(II), pp. 128a-132a.

This proposed federal nuclear tort statute was rejected by the Congress:

> "However, the committee does not believe it is necessary to go to the length of enacting substantive law - that is a new body of federal tort law - to achieve these ends...
>
> This [waiver of defenses] approach to the problems discussed above is in keeping with the approach followed in enacting the original Price-Anderson Act - namely, interfering with State law to the minimum extent necessary." S.Rep. 1605, 1966 U.S. Code, Cong. & Admin. News 3201, 3209 (1966).

One exploring the text and legislative history of the 1966 amendments to the Price-Anderson Act will never find a trace of Congress adopting Professor Cavers' other suggestion: that punitive damages should be denied in all nuclear cases.

B. PUNITIVE DAMAGES ARE AVAILABLE IN SUB-THRESHOLD CASES

Even if punitive damages were not available under the Price-Anderson Act, Congress has specifically left sub-threshold cases like this one to state tort law.[7]

The 1966 amendments did not supplant the applicability of state tort law in any way to nuclear incidents not rising to the level of an extraordinary nuclear occurrence:

> "...at the same time, however, the bill has been drafted so that minor claims involving

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[7] The Price-Anderson Act constitutes a "savings clause" within the meaning of Nader, 426 U.S. at 298.

> nuclear facilities or materials may remain subject to the traditional rules . . .
>
> Accordingly, in the absence of some extraordinary occurrence involving a nuclear facility or device or nuclear materials, traditional concepts should be allowed to prevail." S.Rep.1605, 1966 U.S. Code, Cong. & Admin. News 3201,3211 (1966).

When the Price-Anderson Act was extended to 1975 it was again recognized that state tort law applies to sub-threshold incidents. Duke Power Co., Supra, at 89.[8]

Clearly, punitive damages are available under the Price-Anderson Act and the awarding of punitive damages in a sub-threshold case cannot "compete" with the federal regulatory scheme. Regardless, Congress has specifically authorized the application of state tort law to cases such as this without expressed limitation and through repeated legislative history negativing any such limitation. See J.S. App.I, at 21a-22a. As the dissenting opinion below observed:

> "The fact that Congress has expressly excepted the private tort action without

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[8] The Columbia University Legislative Drafting Research Fund concluded that if the Price-Anderson Act was not extended, parties injured in an extraordinary nuclear occurrence "would be subject to whatever tort laws prevailed in the State in which the incident occurred or in which they suffered harm." H.Rep. 698, 94th Cong., 1st Sess, 7 (1975). Punitive damages are, obviously, part of state tort law - a fact Congress was aware of all along.

restriction argues against any implied intent to preempt a part of such action." (J.S. App. (I), 33a,n.1).

WHY THE COURT SHOULD NOT DEFER CONSIDERATION OF THE ISSUES RAISED BY THIS CASE

Even if the court of appeals reached an improper result in this case, the brief of the Solicitor General nevertheless urges the Court to avoid deciding the issues raised by this case and await a "more mature consideration by other courts of appeal." (S.G. Br.11). Apparently, the Solicitor General views the effect of this decision on the states of the Tenth Circuit as inconsequential.[9] Of course, no mention is made of the effect of a denial of certiorari on the parties - the small matter of $10,000,000.00. But, what of the vital interests of the states in the Tenth Circuit?

The Tenth Circuit contains the very heart of the nuclear industry - the nuclear fuel cycle[10] is present throughout these states: 85% of the nation's

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[9] All six states of the circuit provide for the recovery of punitive damages. Colorado: C.R.S.'73, 13-21-102; New Mexico: Wirth v. Commercial Resources, Inc., 630 P.2d 292,298 (N.M. App.1981); Kansas: Lindquist v. Ayerst Laboratories, Inc., 607 P.2d 1339, 1347 (KAN 1980); Wyoming: W.S.A. 1977 §12-5-502 and Sears v. Summit, Inc., 616 P.2d 765,772 (WY 1980); Utah: Elkington v. Foust, 618 P.2d 37,41 (Utah 1980).

[10] The fuel cycle consists of mining, milling, conversion, fuel fabrication, fuel use, reprocessing and waste storage. Loftness, Energy Handbook, Van Nostrand, New York, 1978, p.260.

total uranium reserves, U.S. Department of Energy, Statistical Data of the Uranium Industry, 1979[11]; identifiable thorium reserves, Cuff & Young, The United States Energy Atlas, Free Press, New York 1980 (hereafter, Energy Atlas), p.184, as well as lithium, Energy Atlas, p.188; 16 of the 17 active uranium mills in the United States, Energy Handbook, p.260 which produce tons of radio-active waste called "tailings" - sands and slime residues which remain after extraction from the bulk of the ore, Energy Handbook, p.274; the Fort St. Vrain nuclear power plant is located near Weld, Colorado, and the Wolfe Creek nuclear power plant is nearing completion outside Coffeyville, Kansas. U.S. Dept. of Energy, Inventory of Power Plants in the United States, 1980 Annual pp.49,102; and, finally, rock salt deposits suitable for the proposed disposal of high level radioactive waste, Energy Handbook, p.277.

Of particular importance, two of the world's largest nuclear facilities are found within the circuit: the Los Alamos Scientific Laboratory is a major nuclear research center located near Santa Fe, New Mexico, situated between Denver and Boulder, the Rocky Flats Plant manufactures the plutonium triggers for the nation's nuclear arsenal and was the site of one of the most expensive industrial accidents in history.

Based on the above, it is hard to imagine an area of our country where the effect of the decision of the court of appeals could be more pernicious - where the citizens of states would be more directly affected by the abrogation of their long-standing

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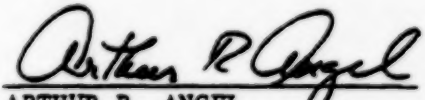
[11] See also United Nuclear Corp. v. General Atomic Co., 629 P.2d 231,271 (N.M.1981).

rights. This Court should decline the invitation of the Solicitor General to await a decision from another court.

CONCLUSION

It is doubtful that the Court will be presented with a more complete record upon which to decide these momentous issues no matter how long the Court waits for another court to face reckless misconduct by a nuclear defendant. Most certainly, these issues should not be decided without the benefit of the full briefs of the appellant and the Amici States and the oral argument of counsel. Now is the time to decide this issue and this is the case.

Respectfully submitted,



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No. 81-2159

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BILL M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, Deceased,
Appellant,

v.

KERR-MCGEE CORPORATION, a Delaware corporation, and KERR-MCGEE NUCLEAR CORPORATION, a Delaware corporation,
Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

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QUESTIONS PRESENTED

1. Does the Atomic Energy Act, as amended, preempt the award of punitive damages in a state law tort suit arising out of radiation contamination caused by a private nuclear company?

2. If so, does the Act to that extent violate due process?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2159

BILL M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, Deceased,

Appellant,

v.

KERR-MCGEE CORPORATION, a Delaware corporation, and KERR-MCGEE NUCLEAR CORPORATION, a Delaware corporation,

Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Oklahoma denying appellees' motion for judgment *n.o.v.* or new trial is reported at 485 F. Supp. 566, and is reprinted in the Appendix to the Jurisdictional Statement at 42a-126a. The opinion of the United States Court of Appeals for the Tenth Circuit affirming in part and reversing in part, together with the dissenting opinion, are reported at 667 F.2d 908 and reprinted in the Appendix at 1a-41a.

JURISDICTION

Kerr-McGee and the Solicitor General have questioned whether the Court has appellate jurisdiction in this case under 28 U.S.C. § 1254(2), and the Court has postponed determination of that question. For the reasons that follow, this case is properly before the Court on appeal.[1]

[1] The timeliness of the appeal is demonstrated in the Jurisdictional Statement, at p. 2.

1. Section 1254(2) provides that "[c]ases in the courts of appeals may be reviewed by the Supreme Court . . . [b]y appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . . ." Those prerequisites are met in this case.

In Oklahoma, "[t]he availability of punitive damages is controlled by statute." *Phillips Machinery Co. v. LeBlond, Inc.*, 494 F.Supp. 318, 325 (N.D. Ok. 1980); see also *Dayton Hudson Corp. v. American Mut. Lia. Ins. Co.*, 621 P.2d 1155, 1158-60 (Ok. 1980). The statute provides that a jury may award such damages "[i]n any action for the breach of an obligation not arising from contract." 23 O.S. § 9. See *Thiry v. Armstrong World Industries*, —— P.2d ——, 54 Ok. Bar. Assn. J. 782, 783 (March 22, 1983) (the "statutory scope" of § 9 authorizes a jury to award punitive damages, upon the requisite showing of culpability, "in *any action*" other than for breach of contract) (emphasis in original). The district court, therefore, upon finding that the evidence in this case would support a finding for plaintiff under this statute, was required by the statute to submit the issue of punitive damages to the jury, *State ex rel. Pollution, etc. v. Kerr-McGee Corp.*, 619 P.2d 858, 866 (Ok. 1980), and to instruct, as the court here did, that the jury could award punitive damages in this case if it found that the circumstances specified in the statute were present, i.e., if Kerr-McGee was "guilty of oppression, fraud, or malice, actual or presumed." (App. 112a, quoting the language of § 9).

On appeal to the Tenth Circuit from the jury's award, the briefs for both sides acknowledged that in Oklahoma the availability of punitive damages is controlled by the Oklahoma statute.[2] And, in deciding whether the award

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[2] The Brief of Plaintiff-Appellee in the court of appeals began by noting (at p. 2) that plaintiff's contention was that punitive damages in this case were "justifi[ed] . . . under 23 O.S. § 9;" and the brief explained in its argument that "Oklahoma allows punitive

of punitive damages was permissible, the court of appeals "consider[ed] only one [argument], the claim of federal preemption" (App. 21a). Stating that it was "requir[ed] . . . to hold invalid any state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards . . . ." (App. 24a), the court struck down this "award of exemplary damages under state law" on the ground that it "intru[ded]" on the federal agency's authority and therefore was preempted. *Ibid.*

In these circumstances, the court of appeals has necessarily held that 23 O.S. § 9, as applied to nuclear operators covered by the Atomic Energy Act, is "repugnant to the . . . laws of the United States." 28 U.S.C. § 1254(2).[3] And, as the Solicitor General correctly acknowledges, this Court's decisions make clear that "[s]ection 1254(2) may be invoked where the court of appeals has held that a state law is invalid, not in all conceivable circumstances, but only as applied to the facts of the case." Brief for the United States as Amicus Curiae, p. 6. See *Malone v. White Motor Corp.*, 435 U.S. 497, 499 (1978); *Dutton v. Evans*, 400 U.S. 74, 76 n.6, 87-88 (1970); *City of Detroit v. Murray Corp.*, 355 U.S. 489, 491-492 (1958).[4] Ac-

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damages to be imposed in cases where fraud, oppression, gross negligence, or malice are present, 23 O.S. § 9" (*id.*, p. 67). The Brief of Defendants-Appellants likewise stated (at p. 59) that "[r]ecovery of punitive damages under Oklahoma law is limited by statute," citing § 9; discussed how the Oklahoma courts have "interpreted the statute" (*ibid.*); and described the kind of evidence necessary "[t]o meet the requirements of 23 O.S. § 9" (*id.*, p. 60).

[3] As the Solicitor General acknowledges "[t]he holding of invalidity contemplated by Section 1254(2) encompasses determinations that the state law is preempted by a federal statute." Brief for the United States as Amicus Curiae, p. 6 n.6. See, e.g., *Malone v. White Motor Corp.*, 435 U.S. 497, 499 (1978); C. Wright, A. Miller & E. Cooper, 17 *Federal Practice and Procedure: Jurisdiction*, § 4037, p. 46 (1978).

[4] See also J. Moore, H. Bendix & B. Ringle, 12 *Moore's Federal Practice: Supreme Court Jurisdiction and Practice*, ¶ 435.01[1] at p. 6-51 (1982).

cordingly, this case is properly here on appeal under § 1254(2).

2. Kerr-McGee and the Solicitor General make much of the fact that the court of appeals did not expressly declare that it was holding § 9 invalid as applied.[5] But this Court has recognized that where the basis of a lower court's ruling is that the application of a statute to particular circumstances is invalid under federal law, an appeal properly lies even if the lower court "did not expressly hold [the statute] unconstitutional as applied." *California v. Grace Brethren Church*, —— U.S. ——, 102 S.Ct. 2498, 2506 (1982) (28 U.S.C. § 1252). This Court's appellate jurisdiction is determined by what the lower court actually held, not by the form of words the lower court used to express that holding.

3. The Solicitor General also claims that the court of appeals did not address arguments that had been advanced by Kerr-McGee that, if adopted, would have overturned the award of punitive damages as a matter of *state* law.[6] The only argument advanced by Kerr-McGee to the Tenth Circuit apart from preemption was that the evidence respecting "oppression, fraud or malice" did not warrant submitting the punitive damage issue to the jury;[7] there was no contention that the district court had misconstrued the state statute.[8] But even if there *had*

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[5] See Motion to Dismiss, pp. 7-8; Brief for the United States as Amicus Curiae, pp. 7-8.

[6] See Brief for the United States as Amicus Curiae, pp. 8, 9-10. As noted, the court of appeals stated that with respect to the issue of punitive damages it had "consider[ed] only one [argument], the claim of federal preemption." (App. 21a).

[7] Brief of Defendants-Appellants to Tenth Circuit, pp. 59-61. Kerr-McGee also contended that the amount of the jury's punitive damage award was excessive, *id.*, pp. 68-70.

[8] The Solicitor General has conjured up a number of ways in which the Oklahoma Courts might give a limiting construction to 23 O.S. § 9 that would render it inapplicable to this case. Brief for the United States as Amicus Curiae, pp. 9-10. None of these limit-

been a claim of improper construction of the state statute, there would be no merit to the Solicitor General's contention that the court of appeals' failure to resolve that claim would affect this Court's appellate jurisdiction.

Under parallel jurisdictional statutes, the Court has consistently rejected such suggestions. See, e.g., *Orr v. Orr*, 440 U.S. 268 (1979):

> Where the state court does not decide against a petitioner or appellant upon an independent state ground, but deeming the federal question to be before it, actually entertains and decides that question . . . this Court has jurisdiction to review the judgment . . . . We cannot refuse jurisdiction because the state court might have based its decision, consistently with the record, upon an independent and adequate non-federal ground. [*Id.* at 276-277, quoting *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 98 (1938).] [9]

4. Finally, the Solicitor General suggests that 23 O.S. § 9 is "a statutory declaration of common law," and that such an enactment should not be considered a "State statute" for purposes of § 1254(2).[10] No state statute has ever been held by this Court not to be a "State statute"

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ing constructions was sought by Kerr-McGee in the court below. The appellate jurisdiction surely is not defeated because state law grounds can be hypothesized that not only were not the *basis* for the decision of the court below but were not even *advanced* to the court below. Moreover, as Kerr-McGee's failure to assert these theories below suggests, they are specious in light of Oklahoma decisional law. We showed this in Appellant's Brief in Response to Brief of Solicitor General and in Opposition To Appellees' Motion to Dismiss or Affirm, pp. 7, 9-10. See also *Thiry, supra* (§ 9 authorizes punitive damages "in any action" other than for breach of contract).

[9] See also *United States v. Raines*, 362 U.S. 17, 20 (1960); *United States v. Clark*, 445 U.S. 23, 25-26 and n.2 (1980); *Delaware v. Prouse*, 440 U.S. 648, 652 (1979); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566-568 (1977).

[10] Brief for the United States as Amicus Curiae, p. 10 and n.15.

for purposes of § 1254(2).[11] If words are to retain their meaning, the Solicitor General's contention must be rejected.

What is more, in § 9 the Oklahoma legislature has not simply declared what the common law would otherwise necessarily have provided. Absent a statute, the highest state court would be free to disapprove punitive damages. See, e.g., Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 518 (1957). That happened in Colorado, until reversed by statutory enactment. *Murphy v. Hobbs*, 7 Colo. 541 (1884), see note, *supra*, 70 Harv. L. Rev. at 518, n.11. In a few other states, punitive damages are available only for certain torts and not others, *ibid.* at 518, nn. 6,7. Because of § 9, the Oklahoma Supreme Court is not free to abandon punitive damages, or to hold them unavailable in any kind of tort action. *Thiry, supra.* To the contrary, § 9 reflects "the Oklahoma legislature['s] . . . strong and current interest in the availability of punitive damages", *In re Air Crash Disaster Near Chicago, Illinois*, 644 F.2d 594, 627 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981), and represents the "legislated policy" of the state to which its courts must adhere, *Dayton Hudson Corp., supra*, 621 P.2d at 1159.

The decision below, because it invalidates the "legislated policy" of the state, creates just that confrontation between the federal judiciary and a state legislature for which appellate jurisdiction in this Court was provided in 28 U.S.C. § 1254(2).

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[11] Nor has it been deemed significant that a state statute deals with a subject which would otherwise be governed by common law. See *Dutton v. Evans, supra*, 400 U.S. at 76 n.6, 83 n.15 (appeal held proper under § 1254(2) where court of appeals held that a Georgia statute defining the admissibility of statements of co-conspirators was unconstitutional as applied).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause (Article VI, Clause 2) and Fifth Amendment to the United States Constitution are reprinted in the Appendix to the Jurisdictional Statement (hereinafter "App.") at 137a.

The statutory provisions relevant to this Court's jurisdiction, 28 U.S.C. §§ 1254, 2103, are reprinted at 137a-138a.

Provisions of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011 *et seq.*, pertinent to the preemption issue presented on this appeal are reprinted at App. 138a-151a.

The Oklahoma punitive damages statute, 23 O.S. § 9, is reprinted at App. 151a.

STATEMENT OF THE CASE

A. Proceedings Below

This is a state law tort action initiated in the United States District Court for the Western District of Oklahoma, with jurisdiction based on diversity of citizenship. Appellant (plaintiff), the father of Karen Silkwood, is the administrator of her estate, the sole beneficiaries of which are her three minor children. (Karen Silkwood is referred to hereinafter as "Silkwood"). Appellees (defendants) are Kerr-McGee Nuclear Corp., which operated the plant at which Silkwood was employed, and Kerr-McGee Corp., the parent corporation. (The jury found that the former corporation was the "mere instrumentality" of the latter, I J.A. 203; App. 126a.[12] The two are referred to hereinafter jointly as "Kerr-McGee".)

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[12] The Court has waived the requirement for preparing a joint appendix in this Court. As used herein, "J.A." refers to the Joint Appendix in the Tenth Circuit. That Joint Appendix is in five volumes, and is cited herein by "[volume] J.A. [page]." "App" refers to the Appendix accompanying the Jurisdictional Statement in this Court.

The complaint sought both actual and punitive damages for the injuries to person and property suffered by Silkwood when she was contaminated by plutonium from the nuclear fuel fabrication plant operated by Kerr-McGee. Following an eleven-week trial, and two-and-one-half days of deliberation, the jury returned a verdict of $505,000 actual damages ($5,000 for property damage and $500,000 for personal injury) and $10,000,000 punitive damages. I J.A. 3-5, 202-203; App. 115a.

Kerr-McGee appealed from all elements of the award. The Tenth Circuit affirmed the $5,000 property damage award, holding that compensatory damage awards under state law are not preempted by the Atomic Energy Act. The court set aside the $500,000 personal injury award, reversing the district court's construction of the Oklahoma Worker's Compensation Act and holding that that Act precludes compensation in a tort action for injuries resulting from off-worksite contamination.[13] The court also set aside the punitive damage award on the sole ground that the Atomic Energy Act preempts the states' authority to award punitive damages for radiation injuries inflicted by companies operating facilities covered by that Act. It is the last of these holdings that is the subject of this appeal.

B. The Facts

As the jury returned a verdict for plaintiff, the evidence must be viewed in the light most favorable to plaintiff. Our recitation of the facts proceeds accordingly.

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[13] Even with respect to otherwise covered events, the Worker's Compensation Act does not preclude lawsuits over intentional or willful conduct. There is substantial evidence supporting a claim of intentional or willful injury in this case (see, *e.g.*, App. 132a-136a). Following disposition of this appeal, plaintiff will further pursue this issue in the district court. See Jurisdictional Statement, p. 6, n.5; Appellant's Brief in Response to Brief of Solicitor General and in Opposition to Appellees' Motion to Dismiss or Affirm, pp. 8-9.

Silkwood was employed as a laboratory analyst at Kerr-McGee's Cimarron plant from August, 1972, until her death on November 13, 1974. The plant—which began operations in 1971 and was closed permanently in 1975—produced plutonium-based fuel rods for an experimental breeder reactor. Plutonium is a carcinogen, and one of the most toxic substances known, even in microscopic quantities. It is particularly dangerous when inhaled, and there is no known safe method for removing it from the lungs. (App. 3a; III J.A. 912-919, 926-928, 937-938, 980-983, 1054-55; Tr. 5763).

The Cimarron plant was licensed by the Atomic Energy Commission ("AEC"), and a condition of the license was compliance with regulations laid down by the AEC. There is no known safe level of exposure to radiation (App. 64a). AEC regulations enjoined all licensed operators to "make every reasonable effort to maintain radiation exposures, and release of radioactive materials in effluents to unrestricted areas, as low as practicable." (App. 65a).[14]

It was understood by the AEC and the industry that the AEC's regulations reflected only the minimum care that should be given; that compliance was no guarantee of safety; and that the licensee was expected to do more than was minimally required if demanded by reasonable prudence. (App. 61a-66a; IV J.A. 1511, 1523.).

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[14] In addition, the regulations provided prescribed numerical exposure levels—ten times higher for employees than for members of the public—which licensees were not to exceed. (App. 69a-70a). As this ten-fold dichotomy suggests, these levels were not considered *safe*, but were considered benchmarks that if exceeded could subject the operator to loss of license (IV J.A. 1523). The "as low as practicable" standard was prescribed in the regulations in recognition that the numerical levels were "no guarantee of safety" (*Id.* 1527, see also App. 65a; II J.A. 942). Subsequent to events giving rise to this lawsuit, the "as low as practicable" standard was changed to "as low as is reasonably achievable" 40 Fed. Reg. 58847 (1975); 10 C.F.R. § 20.1(c).

In separate incidents on November 5, 6, and 7, 1974, Silkwood was contaminated with plutonium from Kerr-McGee's facility. On November 5, after she had been working in the plant's laboratory, a monitoring device detected contamination on Silkwood's left hand, right wrist, upper arm, neck, hair and nostrils. (Contamination of the nostrils is the most alarming form of surface contamination, for it is the likeliest indicator that plutonium has been inhaled). Silkwood was immediately "decontaminated" (i.e., the surface contamination was scrubbed away) and at the end of the day the monitors detected no surface contamination. (App. 4a-5a).

The next day, after performing paperwork in the laboratory, Silkwood monitored herself and discovered contamination on her hands, forearms, face, and neck. Later in the day, a subsequent monitoring disclosed contamination in her nostrils as well. Again, she was decontaminated. (App. 5a).

On the third day, November 7th, Silkwood went directly to the health physics office upon arriving at the plant. Monitoring disclosed contamination in her nostrils, hands, arms, chest, back, neck, and right ear. Because it was apparent that the site of contamination was outside the plant, a company decontamination squad was dispatched to Silkwood's apartment, and found contamination in several rooms, and on a package containing luncheon meat and cheese in her refrigerator. (App. 5a; IV J.A. 1291-92, 1295-97).

It was stipulated by the parties that the plutonium that had caused Silkwood's contamination had come from the Kerr-McGee plant (App. 95a), although the precise manner by which it had escaped was never officially determined.[16] The levels of contamination found on November

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[16] The court charged the jury that it would be a complete defense if Silkwood had intentionally carried the plutonium from the plant (App. 100a). In response to a specific interrogatory, the jury found that this was not the case (I J.A. 202). The court below concluded that this finding was consistent with the evidence (App. 8a).

7 on Silkwood's body and in her apartment greatly exceeded the levels of prior days (IV J.A. 1316; Tr. 4704-11), and triggered exceptional procedures. Decontamination of Silkwood's apartment—which entailed the destruction of virtually all her personal belongings—was necessitated, and required nearly a month to complete. (II J.A. 385, 732, 748-49).[17] Silkwood herself was sent to the Los Alamos Scientific Laboratory for testing to determine the extent of contamination of her vital body organs. (App. 6a).

Witnesses who observed Silkwood following the contaminations testified that "[s]he was fearful of a slow death from cancer, became hysterical at times, and approached a nervous breakdown as she became the focus of federal agency and industry investigations into the incident" (App. 83a).

Silkwood returned to work at the Cimarron plant on November 13. That night, she was killed in an automobile accident. (App. 6a).[18]

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[17] As Silkwood sat outside her apartment—in an apparent state of shock and hysteria—while the decontamination team removed her personal belongings, a Kerr-McGee lawyer arrived on the scene, questioned her, and got her to sign a statement. (IV J.A. 1474-76; II J.A. 386-387). Kerr-McGee did not similarly send a doctor (IV J.A. 1476).

[18] Silkwood's death resulted from an automobile accident while she was driving alone *en route* to a meeting with a New York Times reporter at which she was to present evidence of safety violations at the Kerr-McGee plant (App. 6a, 133a-134a). Just before entering her car, Silkwood showed the documents to a fellow worker; following the automobile crash, the documents were never located. (App. 136a). Among the matters as to which Silkwood had claimed to have found evidence was that Kerr-McGee was doctoring photographs of defective fuel rod welds. Subsequent government investigations found that photographs had indeed been touched up to obscure defects in the negatives in or near the critical weld areas. (App. 136a).

There was expert testimony that the degree of contamination suffered by Silkwood produced immediate physical injury, including initiation of the cancer process and genetic damage that could have been transmitted to any child that she bore.[19] An autopsy following her death estimated that her body contained at least 2½ times the *lifetime* dose for members of the public set out in the AEC's numerical standard,[20] and at least one-fourth the lifetime dose set out therein for employees of nuclear facilities. (App. 69a). Expert witnesses testified that the actual amount of contamination may have been many times higher than the estimate.[21]

James Keppler, the AEC's Regional Director at the time of Silkwood's contamination, testified that the plant during its five-year existence was cited by the AEC for approximately 75 violations of AEC regulations (IV JA 1513); that "Kerr-McGee management [was] not committed to ALAP [as low as practicable] on exposures" (*id.* 1520-21); and that contamination incidents got "short shrift" from management so long as they did not exceed the numerical exposure limits (*id.* 1521) because the AEC lacked "regulatory teeth" to enforce the "as low as practicable" standard (*id.* 1522).

Dr. Karl Z. Morgan, who for 29 years was Director of the Health Physics Program at Oak Ridge National Laboratory, and is one of the world's leading experts on radiation health and safety (II J.A. 368-374), testified that until he studied Kerr-McGee's operation of the Cimarron plant "I could not imagine that such a lackadaisical attitude could be developed in an organization in reference to the health and safety of the people" (III JA 1055). Kerr-McGee's willingness to continue operations despite contamination incidents and without first

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[19] III J.A. 921-929, 934-935.

[20] See n. 14, *supra*.

[21] II J.A. 809; III J.A. 990-992, 1004-06; IV J.A. 1626-27.

removing the sources of contamination was, according to Dr. Morgan, "inexcusable and irresponsible" (*id.* 1057, see also 1055-56). He testified that Kerr-McGee's health physics program was "very weak and inadequate"; there was inadequate training of employees, inadequate equipment, and unqualified health physics personnel (*id.* 1057, 1076-77).[22]

> It would take hours to even summarize the faults I found . . . [T]he instructors were not motivated to follow the rules, they broke them repeatedly, many of the employees went to work, worked quite awhile before they had any instructions at all. There were cases where the employee would work and without any instructions, and then not even know how to call the health physicist when the alarms went off. The rule was, 'Well, you've got to wait until you get a whole class, and then we'll get them together and teach them, it is cheaper that way'" [*id.* 1077-78].

There were 574 reported contamination incidents during the five years that the plant operated (P.Ex. 28). Dr. Morgan testified:

> This is the evidence that the people [employees] aren't really concerned about the radiation. They don't realize that it is this contamination that might get into their lungs, into their system, that causes cancer. One of the things that worried me so much was that in all the training programs, in the manuals that I've looked over, there was essentially nothing mentioned about a 'cancer risk'. It is like asking me to go in a lion's cage and not telling me there are any lions in the cage" [*id.* 1079-80].

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[22] The risks associated with the last of these problems were exemplified by Kerr-McGee's effort, following Silkwood's contamination, to get her to take an unauthorized and dangerous drug (*id.* 1057-58). Kerr-McGee's chief of health physics had his degree in poultry husbandry (IV J.A. 1315).

There was evidence that the failure to advise employees of cancer hazards was intentional.[23]

Dr. Morgan—contrasting the safety practices at this plant with the industry norm—testified that Cimmaron was the worst facility from the standpoint of safety he had encountered in his 35 years as a consultant to the nuclear industry (*id.* at 1055-58). It was his conclusion that Kerr-McGee's practices reflected a "callous" and "wanton" disregard for the health and safety of employees (Tr. 1552, 1563, 1567).

Kerr-McGee's inventory system was so lax that three years after the plant was closed, over forty pounds (18,160 grams) of plutonium still could not be located (Tr. 7963-65; II J.A. 384; III J.A. 1494). Evenly distributed, *one-half gram* of plutonium—which could be removed from the plant without detection under the security system chosen by Kerr-McGee—is enough to give 35 million people their lifetime lung burden (II J.A. 377-379; IV J.A. 1492-93).[24]

C. Proceedings Respecting Punitive Damages

Under 23 O.S. § 9, a jury is authorized to award punitive damages "where the defendant has been guilty of oppression, fraud or malice, actual or presumed,"

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[23] A company official acknowledged at trial that in preparing the training manual he had copied the description of radiation hazards verbatim from a published text, except that wherever the word "cancer" appeared in the text he had substituted highly technical words (Tr. 5813-19; P. Ex. 283; D. Exs. 5, 6, 7)—words that were incomprehensible to the young workers, many from rural backgrounds, who comprised the plant's work force. (III J.A. 1108, 1120-21; Tr. 2471, 5736-37, 6525-27, 8685-94).

[24] The evidence recited in text is merely a portion of the voluminous evidence introduced by plaintiff in support of the claim for punitive damages. See also, *e.g.* II J.A. 433, 436-444, 481-483; III J.A. 1015-22, 1026-28, 1036-37, 1055-57, 1059-62, 1099-1102, 1106-08, 1111-12, 1120-21, 1128-30; IV J.A. 1324-25, 1406-07, 1520-21, 1538-39; Tr. 8195; P. Ex. 28, pp. 102-104.

and it is reversible error for a trial court not to submit the issue of punitive damages to the jury where the evidence would support a finding of the requisite culpable intent (see p. 2, *supra*). In accordance with Oklahoma Supreme Court decisions construing this statute, the trial judge in the instant case charged the jury that such damages are available "for the sake of example and by way of punishment" for "evil intent"; and that such intent may be found when a defendant is "grossly and wantonly reckless in exposing others to dangers," or exhibits "reckless disregard of another's rights, manifesting an indifference to the consequences of the act" (App. 112a-113a).[25]

When, following the jury's verdict, Kerr-McGee moved, *inter alia*, to set aside the punitive damage award on the ground that the evidence did not support a finding of the state of mind requisite to justify such an award, the trial judge, in denying the motion, stated that there was evidence to support a finding that Kerr-McGee was "aware of defects within [the] facility that would render likely repeated exposures of employees to plutonium, but did nothing to correct it" (App. 72a); that the plant was run by an "uninformed or indifferent management" (App. 86a); and that there was "poor training, poor security" and a workforce not educated "to the hazards of plutonium" (App. 85a).

In the post-verdict motion, Kerr-McGee also contended that punitive damages were preempted if Kerr-McGee's conduct was in substantial compliance with AEC regulations. The District Court noted that there was ample evidence to support a jury verdict of punitive damages here even if their availability were limited to situations where there was not substantial compliance

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[25] This charge was in accord with decisions of the Oklahoma Supreme Court. See pp. 44-45, n.47, *infra*.

with AEC regulations (App. 75a-76a).[28] But, as the District Court had refused to so limit the availability of punitive damages in its instructions to the jury, acceptance of Kerr-McGee's legal proposition would have required a new trial. Accordingly, the District Court addressed that proposition on its merits.

In rejecting Kerr-McGee's contention, District Judge Theis reasoned as follows:

> Little . . . need be said on this Court's failure to instruct the jury that substantial compliance with government regulations would bar an award of punitive damages. The existence of wanton conduct depends upon the actor's or tortfeasor's mental attitude at the time of the conduct. *Tappen v. Ager*, 599 F.2d 376, 382 (10th Cir. 1979). The culpable mental attitude necessary for punitive damages was set forth in the punitive damage instruction. For the same reason that mere compliance with government regulations cannot necessarily be found consistent with the reasonable person standard, so too it cannot necessarily be found consistent with an attitude and conduct devoid of that state of mind for which an award of punitive damages is appropriate.
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> **The character of the conduct and the state of the actor's mind control the propriety of punitive damages, and not merely whether that conduct complies or fails to comply with a government regulation. See Restatement, *Torts* § 908(2) com. e at 556-57 (1939). [App. 70a-72a].**

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[28] **At trial, plaintiff established that, as to Silkwood, Kerr-McGee violated AEC regulations governing radiation exposures for the general public and nuclear workers as well as the as low as practicable standard. Additionally, Kerr-McGee repeatedly violated AEC requirements with regard to inventory and accountability controls, physical security, training, management and reporting. See pp. 12-14, *supra*.**

On appeal, Kerr-McGee contended that the Atomic Energy Act preempts punitive damages where there has been "substantial compliance with AEC regulations" and that the trial judge erred in not so instructing the jury.[27] The Tenth Circuit panel majority (Judges Logan and McKay) ruled that the preemptive effect of the Act was much broader than that urged by Kerr-McGee, holding that punitive damages may not be awarded for radiation injuries inflicted by a nuclear operator irrespective of whether the operator violated AEC regulations.

The panel majority recognized that Congress expressly decided that cases such as this are to "remain subject to the traditional rules of tort law" (App. 19a). The panel majority accordingly held that compensatory damages can be awarded under whatever standard of liability state law prescribes—even if the operator has fully complied with AEC regulations (App. 20a). The panel majority further acknowledged that the congressional decision to permit application of "the traditional rules of tort law" "may be read to permit punitive as well as compensatory damages in states like Oklahoma which permit them" (App. 22a), and that "[a]rguably there should be a strong presumption against preemption of state laws affecting such vital interests of its citizens as those involved in the instant case" (App. 24a). But despite these premises, the panel majority found preemption because Congress intended to preempt the field of licensing and safety regulation of nuclear facilities; punitive damages are "punishment for bad practices or to deter future practices involving exposure to radiation"; and accordingly punitive damages constitute "state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear materials" (App. 24a).

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[27] Brief of Defendants-Appellants to 10th Cir., pp. 61-64.

Judge Doyle dissented. He reasoned:

> It is one thing to preempt the area which the federal government has undertaken to license and regulate; it is another for a court to read into the Act an intent to preempt a form of damages which would otherwise be a part of an isolated private lawsuit. This conclusion is particularly apt where no evidence exists either on the face of the Act or otherwise of an implied purpose to so preempt by the Congress.[1] Indeed, the fact that private lawsuits are tolerated without any limitations argues against the majority position.
>
> [1] The fact that Congress has expressly excepted the private tort action without restriction argues against any implied intent to preempt a part of such action.
>
> [App. 32a-33a.]

The majority's recognition that Congress intended to allow compensatory damages under state law wholly refuted, in Judge Doyle's view, its conclusion that punitive damages are preempted:

> If a tort action does not interfere, the award of exemplary damages cannot impede federal government regulation. After all, the award of a large amount of actual damages can be equally punishing. It is the money which causes the suffering, not the designation.
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> **The Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2284, preempts the field of nuclear licensing and regulation. But until now, no effort has been made to abolish damages in a private civil action. No collision exists nor is one possible between the simple state law inspired tort action and the federal government. To say that preemption prevents the imposition of exemplary damages in connection with a civil judgment carries the preemption concept far beyond anything that could have been intended or could ever be implied. [App. 38a].**

SUMMARY OF ARGUMENT

A. To justify preemption of traditional remedies in state law tort suits, there must be powerful evidence that Congress so intended. Here, the evidence is entirely to the contrary. The express and consistent congressional judgment has been that, with limited exceptions not relevant here, state tort law is to govern in suits brought against private companies in the nuclear industry by those who have suffered injuries from radiation. Thus, the authoritative legislative materials expressly state that "the claimant's right to recovery . . . is left to the tort law of the various States" (p. 30, *infra*); claims will "remain subject to the traditional rules of tort law" (p. 35, *infra*). In a few specific instances unrelated to punitive damages Congress has determined to limit a particular facet of state tort law, but those instances have been accompanied by legislative statements that in all other respects state tort law is to continue to apply (pp. 33-36, *infra*). The one proposal that Congress expressly forbid punitive damage awards was not adopted by Congress, and the AEC (now NRC) has administered the statute on the understanding that punitive damages are not preempted (pp. 36-40, *infra*).

B. The foregoing legislative history controls the answer to the preemption question posed in this case: Congress did not intend to preempt the states' right to award punitive damages. The court below reached a contrary result by ignoring this direct evidence of legislative intent respecting tort actions, and instead drawing inferences from Congress' treatment of a different subject: the role of the states in administrative regulation of radiation safety. The court below overlooked that Congress has marked out a very different role for the states in providing remedies in tort suits involving nuclear facilities than in the licensing and administrative regulation of such facilities; the court erred by transposing Congress' decision on the latter subject to

the former, in disregard of the quite different answer Congress provided there.

Moreover, even on its own terms the decision of the court below cannot withstand analysis. The court below acknowledged that Congress unquestionably left to state tort law the task of providing *compensatory* damages, but held nonetheless that *punitive* damages are "regulatory" and thus preempted. However, to the extent that state law tort suits against private nuclear companies may be said to be "regulatory," it is the compensatory damages, not the punitive damages, that "regulate" the companies' conduct, by setting the standard for that conduct. Punitive damages are not assessed for simple failure to meet a standard of conduct. Punitive damages are awarded because conduct is the product of ill-will or a reckless state of mind. States have a special interest in policing conduct motivated by a malicious state of mind that endangers the health and safety of their citizens—whether that conduct involves operating a nuclear facility or driving a car.

This Court has long recognized that the punishment of outrageous conduct is wholly peripheral to federal regulatory concerns but lies at the core of "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *San Diego Unions* v. *Garmon*, 359 U.S. 236, 243-244.

ARGUMENT

THE ATOMIC ENERGY ACT DOES NOT PREEMPT THE AWARD OF PUNITIVE DAMAGES IN A STATE LAW TORT SUIT ARISING OUT OF RADIATION CONTAMINATION CAUSED BY A PRIVATE NUCLEAR COMPANY

Introduction

The following propositions are undisputed in this case: First, that there is no federal cause of action or other federal remedy for those injured by nuclear occurrences involving privately owned facilities; second, that, with certain limitations not pertinent here, Congress has expressly recognized that state tort law is to govern damage suits arising from such occurrences; and, third, that, while providing other express limitations on such state law tort actions, Congress has never expressly acted to preclude the recovery of punitive damages.

The question in this case is whether, notwithstanding these premises, Congress should be found to have intended to prohibit the exercise of the states' traditional power to award punitive damages in this category of state law tort actions.

As this Court has held:

> ". . . . It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed." *Schwartz v. Texas*, 344 U.S. 199, 202-203 (1952). [*New York Dept. of Social Services v. Dublino*, 413 U.S. 405, 413 (1973)].

Where the state right that would be abrogated is part of traditional tort law, the evidence of a congressional intent to preempt the right must be most powerful:

> [A] common-law right . . . is not to be abrogated "unless it be found that the preexisting right is so repugnant to the statute that the survival of such

> right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory." [*Nader v. Allegheny Airlines*, 426 U.S. 290, 298 (1976); quoting *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1970)].

In the absence of an express determination by Congress to preempt traditional state law tort remedies, only a showing of "irreconcilable conflict between the [federal] statutory scheme and the persistence of common-law remedies" will justify abrogating the latter on preemption grounds. *Nader*, 426 U.S. at 299.

As we now show, no irreconcilable conflict—indeed no conflict at all—exists in this case. We first demonstrate that the legislative history of the pertinent statutes evinces Congress' clear intent not to preempt traditional state law tort remedies in this area (pp. 22-41, *infra*). We then show that the analysis by which the court below carved out an exception for punitive damages is invalid, both because it finds no support in the legislative history and because it is unsound on its own terms (pp. 41-49, *infra*).

A. The Legislative History of Relevant Federal Atomic Energy Legislation Demonstrates That Congress Did Not Intend to Preempt Punitive Damages

(1) *Enactment of The Atomic Energy Act of 1954*

The Atomic Energy Act of 1954 is the point of departure for the question of congressional intent presented in this case. By that Act, Congress effected a basic change in this country's policy toward the development and use of atomic energy. The Act provided for the first time a major role for the private sector in the atomic energy field: "[W]e do not believe that any developmental program carried out solely under governmental auspices, no matter how efficient it may be, can substitute for the cost-cutting and other incentives of free and competitive enterprise." S. Rep. No. 1699, 83rd Cong. 2d Sess. (1954), at 3.

In taking that step, the 1954 Act created no federal cause of action or other means of recovery for those injured in nuclear incidents caused by private facilities. Indeed, that subject was never discussed in the legislative process leading to adoption of the Act. It was assumed by the industry and by subsequent Congresses that the intention of the Congress that passed the 1954 Act was that recovery for such injuries would be governed by state law, just as was recovery for injuries arising from conduct in other sectors of private industry. See *infra*, pp. 24-26.

Nor did the 1954 Congress address the extent to which states could by licensing or other administrative action regulate health and safety issues associated with exposure to radiation. "The whole pre-enactment legislative history of the 1954 Act in fact is barren of any indication that Congress was even aware of the preemption problem with respect to health and safety regulation." Stason, Estep, and Pierce, *Atoms and the Law* (University of Michigan, 1959) at 1005.[28]

The question of recoveries for injuries resulting from nuclear occurrences in private facilities, and the question of the permissible role of state administative safety regulation, were dealt with separately by subsequent Congresses. In 1957 and 1966, Congress addressed certain problems arising from the application of state tort law to radiation injuries caused by privately-owned nuclear fa-

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[28] The only reference to a question of state regulation in the 1954 Act was in section 271: "Nothing in this Act shall be construed to affect the authority or regulations of any Federal, State or local agency with respect to the generation, sale, or transmission of electric power." The history of that section shows that it was inserted in the bill by the Joint Committee on Atomic Energy to reassure the other members of Congress that the Atomic Energy Commission would not become "super power administration"; it was not meant to suggest that in any other respect Congress had consciously decided that the regulatory power of the states should be preempted. See *Atoms and the Law*, *supra*, at 1004-1005.

cilities. In 1959, Congress addressed federal-state relationships in the licensing and administrative regulation of the safety of those facilities. We discuss those subsequent enactments in chronological sequence.

(2) *Enactment of Price-Anderson in 1957*

Immediately following enactment of the 1954 Act, those private companies who, it was hoped, would enter upon the new activities opened by the Act, began to voice concerns about their exposure to potentially bankrupting liability were they to enter the field and then be responsible for a catastrophic nuclear incident. The chorus began with an industry conference held only a few weeks after passage of the Act, and escalated throughout 1955 and 1956.[29]

The cause of the concern was this: If a catastrophe occurred, state tort law would be available to the victims, whose "right prior to the Price-Anderson Act was to utilize their existing common-law and state-law remedies to vindicate any particular harm visited on them from whatever sources." *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 88-89, n. 33 (1978). There was, in the aggregate, only about $60 million dollars of insurance that would be available to the emerging industry, and estimates of the potential damage awards resulting from a nuclear catastrophe were many times that amount. Private industry spread the message that it might not enter the field unless Congress took steps to insulate entrants from the bankrupting damage awards that could flow from state tort law in the event of a nuclear catastrophe.[30]

The Price-Anderson Act of 1957 was Congress' solution. The background of the legislation was stated in the

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[29] Green, *Nuclear Power: Risk, Liability and Indemnity*, 71 Mich. L. Rev. 479, 490-491 and n.54 (1973); *AEC Staff Study of the Price-Anderson Act* (1974), pp. 1-2, reprinted in Joint Committee on Atomic Energy, *Selected Materials on Atomic Energy Indemnity and Insurance Legislation*, 93rd Cong., 2nd Sess. (1974) at 1-2.

[30] See n.29, *supra*.

report of the Joint Committee on Atomic Energy, S. Rep. No. 296, 85th Cong., 1st Sess. at 1 (1957):

> When the Atomic Energy Act was passed, it was the hope of Congress that the provisions in the laws liberalizing the statutory restrictions which had hitherto given the Government a monopoly in the atomic energy field would encourage the entrance of private industry into the program, and speed the further development of the peaceful uses of atomic energy.
>
> It was brought to the attention of the Joint Committee in the 1956 hearings . . . that the problem of possible liability in connection with the operation of reactors is a major deterrent to further industrial participation in the program.

Throughout those 1956 hearings, the common understanding was that, as things then stood, state tort law would be applied in any suits arising out of nuclear incidents. *Hearings before the Joint Committee on Atomic Energy on Governmental Indemnity*, 84th Cong., 2nd Sess. (1956), at 74-75, 161, 235. Indeed, Senators Pastore and Anderson, who were the principal Senate architects of all the atomic energy legislation in the formative years, expressed doubts as to the federal government's power to "step[] upon the sovereign rights of the individual states," *id.* at 190 (Sen. Pastore), or to "walk in and say that the law of the [federal] Government completely supplants or abrogates the laws of the State with reference to the protection of its own citizens", *id.* at 353 (Sen. Anderson).

The bill proposed by the Joint Committee and ultimately adopted by Congress eliminated the deterrent to private entry in the field with only a minimal impact upon state tort law. The bill's approach had three components: (1) the AEC was empowered to require licensees to have financial protection (which could be in the form of insurance, self-insurance, or other means) up to $60 million; (2) federal government indemnification was provided for the next $500 million; and (3) the $560 million

thus aggregated was established as the limit of liability for any one nuclear incident (with a procedure for apportioning that amount should claims arising from a nuclear incident exceed $560 million). S. Rep. No. 296, *supra*, at 19-22.

Of particular pertinence to the instant case, Congress decided that except for the limit of liability and apportionment procedure, state tort law would remain fully applicable. Thus, the Joint Committee report listed, as the first of the two "basic principles underlying the bill":

> Since the rights of third parties who are injured are established by State law, there is no interference with the State law until there is a likelihood that the damages exceed the amount of financial responsibility required together with the amount of the indemnity [*i.e.* $560 million]. At that point the Federal interference is limited to the prohibition of making payments through the state courts and to prorating the proceeds available. [*Id.* at 9].[31]

Because the Price-Anderson Act was not made applicable to plutonium processing plants until 1977 (after the Cimarron plant was closed), its provisions were not applicable to the instant case.[32] But Price-Anderson is

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[31] See also 103 Cong. Rec. 10712 (1957) (Rep. Price):

> The rights of the people who would be injured would be established under State laws . . . This bill is fashioned so as to preserve those rights up to the point where the funds are not available. Then the limitation of liability proceeding is established. This is the only fair way to proceed. Otherwise, you would have the Congress passing on State rules of liability and damages and you would have the Congress passing on each and every claim.

[32] Under Price-Anderson as enacted in 1957, P.L. 85-256, 71 Stat. 576, the AEC was given discretion *whether* to require plutonium processing plants to maintain financial protection (Sec. 170a); indemnification was extended only to those from whom such protection was required (Sec. 170c); and the limit of liability and apportionment provisions applied only to those indemnified (Sec. 170(e)).

[Footnote continued on page 27]

important to the issue presented in this case, for it reflects Congress' clear understanding that, except to the extent provided in Price-Anderson, the Atomic Energy Act does not preempt the application of state tort law in injury lawsuits. As a non-covered facility, the Cimarron plant did not enjoy the limit of liability or government indemnification furnished by Price-Anderson. Thus, in the case of suits arising out of injuries caused by this plant, the legislative history makes clear that "there is no interference with the State law" at all.[33]

(3) *The 1959 Amendments on "Federal-State Cooperation"*

Having dealt in 1957 with the question of tort suits for injuries suffered from private-sector nuclear accidents, Congress in 1959 turned to a separate question respecting the federal-state relationship in the regulation of the private nuclear industry: the extent to which states could or should assume responsibility for the licensing, inspection and administrative regulation of facilities in that industry. In the years between 1954 and 1959, the states had exhibited an increasing interest in the problem of radiation protection, and had adopted numerous and varied licensing and administrative schemes to deal with

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[32] [Continued]

In all these respects, the statute is the same today. 42 U.S.C. § 2210(a), (c), (e).

The AEC did not require plutonium processing plants to maintain financial protection until 1977. 10 CFR § 140.13a; 42 Fed. Reg. 46 (1977). See also Brief for the United States as Amicus Curiae, p. 15, n.18. The situation as of 1975—subsequent to the events giving rise to this lawsuit, and the year in which the Cimarron plant was closed—was explained in S. Rep. No. 94-454, 94th Cong., 1st Sess. 14 (1975):

> Financial protection and indemnity for plutonium processing facilities is discretionary with the Commission under the present law . . . The Commission does not at this time require financial protection of such licensees or extend indemnity coverage to them.

[33] Subsequent amendments of Price-Anderson in 1966, described *infra* at 29-38, confirm this intention, indeed make it even clearer.

that problem.[34] With respect to such regulation, the intent of the 1959 amendments was as follows:

> This proposed legislation is intended to clarify the responsibilities of the Federal Government, on the one hand, and State and local governments, on the other, with respect to the regulation of by-product, source, and special nuclear materials, as defined in the Atomic Energy Act, in order to protect the public health and safety from radiation hazards. It is also intended to increase programs of assistance and cooperation between the Commission and the States so as to make it possible for the States to participate in regulating the hazards associated with such materials. [S. Rep. No. 870, 86th Cong., 1st Sess. (1959) at 8].

In that context, the 1959 amendments provided that with respect to certain facilities the Commission could agree to turn over regulatory authority to states that had developed satisfactory regulatory "program[s] for the control of radiation hazards adequate to protect the public health and safety." § 274(b) and (d), 42 U.S.C. § 2021(b), (d). With respect to other facilities, the Commission was enjoined not to discontinue its regulatory responsibility. § 274(c), 42 U.S.C. § 2021(c). The Act did not in express terms forbid parallel administrative regulation by the states in those areas where the Commission would continue to regulate. But that result has been found to be what Congress intended. *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, (8th Cir. 1971), *affirmed, mem.*, 405 U.S. 1035 (1972); *Pacific*

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[34] *Hearings before the Joint Committee on Atomic Energy on Federal-State Relationships in the Atomic Energy Field*, 86th Cong., 1st Sess. (1959) at 393; see also *id.* at 127-130, 134-278, 385-386; Joint Committee on Atomic Energy, *Selected Materials on Federal-State Operations in the Atomic Energy Field*, 86th Cong., 1st Sess. (1959) at 151-240.

Gas & Electric Co. v. State Energy Commission, —— U.S. ——, 51 L.W. 4449, 4455 (Apr. 20, 1983).[35]

The pertinent point here, however, is that the 1959 amendments had nothing to do with the scope of state tort law applicable in suits arising from radiation injuries. That subject had been addressed in 1957 and would be revisited in 1966. Not once in the legislative materials associated with enactment of the 1959 amendments was the subject of tort suits or tort damages even mentioned. Given this history, particularly Congress' express recognition in 1957 that state tort law would govern damage actions arising out of radiation injuries, Congress' use of the term "regulat[ion]" in the 1959 amendments cannot be understood to encompass the regulatory effects of tort litigation or, specifically, to have limited the types of recoveries available in such litigation.

(4) *The 1966 Amendments to Price-Anderson*

That the distribution of regulatory authority between federal and state governments accomplished by the 1959 Act was not intended to alter the applicability of state tort law in injury lawsuits was confirmed by Congress' actions in 1966 amending the Price-Anderson Act.[36]

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[35] See the discussion *infra*, pp. 46-48, of the reliance by the court below on *Northern States*.

[36] Congress had amended Price-Anderson in 1965 to extend its life for ten years. P.L. 89-210, 79 Stat. 855. During the hearings on the 1965 bill, the Joint Committee received suggestions that state tort law had deficiencies that might preclude compensation to some victims of nuclear incidents, and that the Act should be amended to assure tort recoveries to those injured by nuclear accidents irrespective of whether such recoveries would be available under state law. *Hearings before the Subcommittee on Legislation of the Joint Committee on Atomic Energy on Proposed Extension of AEC Indemnity Legislation*, 89th Cong. 1st Sess. 12-13, 28-29, 211-223, 266-267, 396-440 (1965) (hereinafter *"1965 Hearings"*). The Committee decided to postpone consideration of those issues until 1966, S.Rep. No. 650, 89th Cong., 1st Sess. 13 (1965), and they became the subject of the 1966 legislation described in text.

Congress had before it a variety of proposals designed to assure that victims of nuclear incidents would be compensated, notwithstanding that (1) legal rules in some states made recovery dependent upon proof of fault, (2) statutes of limitations in many states could expire prior to the victim's discovery of latent injuries from radiation, and (3) recovery in some states could not be had from nuclear operators that enjoyed governmental or charitable immunity under state law.

Congress' understanding of the role of state tort law was explained in the report of the Joint Committee on Atomic Energy:

> Since its enactment by Congress in 1957 one of the cardinal attributes of the Price-Anderson Act has been its minimal interference with State law. Under the Price-Anderson system, the claimant's right to recovery from the fund established by the act is left to the tort law of the various States; the only interference with State law is a potential one, in that the limitation of liability feature of the act would come into play in the exceedingly remote contingency of a nuclear incident giving rise to damages in excess of the amount of financial responsibility required together with the amount of the governmental indemnity.

S. Rep. No. 1605, 89th Cong., 2d Sess. 6 (1966). At the hearings that culminated in this report, AEC Commissioner James T. Ramey had testified:

> The Price-Anderson Act provides a fund of up to $560 million from which judgments for public liability obtained by members of the public will be satisfied. Each claimant has the same standing to sue and to recover which he has with respect to liability in connection with any other industry. Similarly, each claimant is subject to the same defenses that can be asserted by any other industry.
>
> Thus, no new tort was created by the Price-Anderson Act of 1957. No new rule of liability was established, nor was there a displacement of sub-

stantive State law, except for the limitation of liability.

Hearings before the Joint Committee on Atomic Energy on Proposed Amendments To Price-Anderson Act Relating To Waiver of Defenses, 89th Cong., 2d Sess. 9 (1966) (hereinafter "*1966 Hearings*").

The 1966 Congress was persuaded that there was a federal interest in making several additional intrusions upon state tort law in those suits covered by the Price-Anderson Act that arose from a major nuclear incident: assuring that in all states the standard of strict liability, rather than negligence, would be applied in determining entitlement to compensation; assuring that statutes of limitation would be long enough to accommodate the lengthy latency period of certain radiation injuries; and assuring that operators should not be able to invoke charitable or governmental immunity to defeat recoveries. Congress recognized that accomplishing those objectives would mean overriding existing state law. However, Congress made two choices that dramatize its desire not to override state law in any respect *except* those that prompted its legislation.

First, Congress had before it two models—two ways in which it could accomplish the substantive ends described above. One, advocated by Professor Arthur Murphy of Columbia Law School, was to create a federal substantive tort law for nuclear accidents that would displace the state tort law. The other, advocated by Professor David Cavers of Harvard Law School, was to leave state tort law intact, but to require AEC licensees who were covered by Price-Anderson, as a condition of their receiving the approval of financial protection and the indemnity afforded by Price-Anderson, to waive their right to invoke enumerated state law defenses in any action brought against them. Congress opted for the latter approach. It did so for both pragmatic and substantive reasons:

(1) There was considerable doubt whether a majority in Congress would vote to enact a bill that displaced state tort law. As Joint Committee Chairman Holifield opined:

> I shudder to think of going in and imposing upon 50 States of the Union a Federal tort, new Federal tort type legislation. I am sure it would generate a tremendous amount of opposition on the principle of the thing [*1966 Hearings* at 31].

Chairman Holifield explained why the federal tort approach advocated by Professor Murphy was not going to be adopted:

> The art of legislation, of course, is the art of the possible. We are faced with such a varied set of laws in the different States, and with sensitivity as to the invasion of States' rights, that we feel that the direct approach of creating a new Federal tort would be unfeasible and impractical from the standpoint of legislative accomplishment [*Id.* at 75].

The Joint Committee's report accordingly declared that one of the considerations that had impelled the Committee to opt for the waiver approach rather than to adopt a federal nuclear tort statute was "the avoidance of the severe difficulties that would be encountered in securing agreement on such a statute." S. Rep. No. 1605, *supra*, at 10.

(2) Of greater importance, Congress did not *want* to interfere with State tort law except in the limited respects identified above. The Joint Committee was told by one of the AEC drafters of the bill that once Congress started down the road of creating a Federal tort,

> We would then have to decide whether there was any part of State law which would continue to be applicable or not.
>
> Would we have to write Federal rules of damages, Federal rules of causation? Many other kinds of problems would have to be faced. We would have to consider whether certain defenses should be al-

> lowed, certain exonerations, the question of channeling of liability, the question of recourse against suppliers, and so forth [*1966 Hearings* at 106-107].

Congress opted instead for the waiver approach because, in the words of the Joint Committee report:

> This approach . . . is in keeping with the approach followed in enacting the original Price-Anderson Act—namely, interfering with State law to the minimum extent necessary. In essence, the plan adopted permits the retention of State law with respect to the cause of action and the measure of damages, but the requirements specified for the insurance contracts and indemnity agreements [i.e., the waivers] provide the uniform rules needed to accomplish the bill's objectives [S. Rep. 1605, *supra* at 9].

In the hearings that culminated in that report, the AEC had endorsed the waiver approach because it was consistent with "the pattern we have followed of displacing State law and legislation only to the minimum extent possible" (*1966 Hearings* at 17). As explained by AEC's General Counsel, Joseph F. Hennessey:

> The amendments would not actually change the structure of the tort laws of the various states. The legal principles of state law would remain unchanged, but certain of the issues and defenses would be affected [*Id.* at 41].

Professor Cavers, whose recommendations were acknowledged by both the Joint Committee and the AEC to have been a principal influence in the shaping of the legislation (*Id.* 80, 215), had advocated the waiver approach because it "permits the retention of State law as the source of the cause of action and the measure of damages" (*id.* 80). And Chairman Holifield emphasized the surgical quality of the waiver approach as contrasted with enactment of a federal tort. The latter, he explained,

> would probably have a wider impact than we seek to achieve.

> We seek to affect one relatively small area of endeavor without getting into the "jungle" of 50 different States' laws [*Id.* at 75].

Statements on the floor of Congress by the bill's sponsors were to the same effect. Thus, Sen. Pastore, the floor manager in the Senate, explained the waiver approach as follows:

> [T]his bill follows the approach of the original Price-Anderson Act; that is, making a minimum interference with the laws of the several states insofar as legal liability for nuclear incidents is concerned. Our committee continues to endorse this general approach [112 Cong. Rec. 23633 (1966)].

And Rep. Hosmer, a member of the Joint Committee, told the House:

> This bill does not superimpose a new body of Federal law upon a segment of our traditional State tort laws . . . Through this [waiver] mechanism the Price-Anderson Act will remain true to the principle that has been a cornerstone of the act since its passage, *viz*, minimal interference with State law [112 Cong. Rec. 24637 (1966)].[37]

Second, in addition to limiting the subjects on which federal law would (via waivers) intrude upon state tort law, Congress also limited the nuclear incidents to which even that limited intrusion would be applicable. By tying the waivers to the financial protection-indemnity scheme, Congress rendered the waivers inapplicable to those nuclear operators, such as Kerr-McGee, that were not part of that scheme. S. Rep. No. 1605, *supra*, at

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[37] Reflective of just how narrow the intrusion was meant to be, Congress emphasized that if state law provided a *longer* statute of limitations than that specified in the waivers, the claimant would continue to enjoy the benefit of the longer state statute; Congress merely wished to assure that nuclear operators would have waived the right to invoke any statute of limitations *shorter* than the ten years specified in the waivers. S.Rep. 1605, *supra*, at 21.

9.[38] And even as to those operators who *were* covered by Price-Anderson the waivers would extend only to certain accidents—those that constituted an "extraordinary nuclear occurrence", or "ENO", a new term created by the bill. This limitation was explained as effectuating the general congressional desire to intrude upon state tort law only where a paramount federal interest was identified.

AEC Commissioner Ramey urged the Joint Committee that the waivers be limited to ENO's because:

> It is desirable not to invoke the mechanisms and procedures of the new system in situations which are not exceptional and which can be well taken care of by the traditional system of tort law [*1966 Hearings* at 6].

Similarly, AEC General Counsel Hennessey explained:

> It would appear eminently reasonable to avoid disturbing ordinary tort law remedies with respect to damage claims where the circumstances are not substantially different from those encountered in many activities of life which cause damage to persons and property [*id.* at 35].

The report of the Joint Committee stated the reason for limiting waivers to ENO's, and the consequence for tort actions in situations that are *not* ENO's, as follows:

> [T]he bill has been drafted so that minor claims involving nuclear facilities or materials may remain subject to the traditional rules of tort law . . .
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> • • • •
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> . . . [T]he committee is of the opinion . . . that there is no pressing need to invoke the mechanisms and procedures of the special waivers in situations which are not exceptional and which can well be taken care of by the traditional system of tort law. Accordingly, in the absence of some extraordinary occurrence involving a nuclear facility or device

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[38] Thus, in the instant case, plaintiff did not have the benefit of a waiver by virtue of Price-Anderson, and had to establish that strict liability would be applied as a matter of state law. App. 20a.

> or nuclear materials, traditional concepts should be allowed to prevail. . . .
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> • • • •
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> . . . Absent such a determination [that an incident is an ENO], a claimant would have exactly the same rights that he has today under existing law—including, perhaps, benefit of a rule of strict liability if applicable State law so provides. Thus, this bill in no way provides for deprivation of a claimant's existing rights [S. Rep. 1605, *supra*, at 11-12.

On the House floor, Rep. Hosmer reiterated that for nuclear incidents that are not ENO's "there are still remedies, the usual ones, and the usual means for settling a claim." (112 Cong. Rec. 24634 (1966)). The bill was enacted without change, Pub. L. 89-645, 80 Stat. 891, and remained unchanged at the time of the incident giving rise to this action—indeed remains so today—in the respects that were the subject of these discussions. See 42 U.S.C. § 2210(n)(1).[39]

A description of the legislative history of the 1966 amendments to Price-Anderson would not be complete without mentioning the one explicit reference to punitive damages that occurred therein. As already noted, Professor Cavers of Harvard Law School played an influential role with respect to the 1966 amendments. He had published a law review article in 1964 urging essentially the scheme enacted in 1966 (a waiver approach ap-

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[39] It is an indication of how limited an intrusion upon state law was accomplished by the 1966 amendments that the Three Mile Island accident did not qualify as an ENO, 45 Fed. Reg. 27590-95 (1980), although it had been declared by the Nuclear Regulatory Commission to be "the most serious nuclear accident to date at a licensed U.S. facility", 44 Fed. Reg. 43128 (1979). Thus, the waivers were not applicable, and state law applied unqualifiedly (except for the $560 million limit of liability), to the lawsuits brought as a result of that accident. A class action on behalf of those living nearby was later settled for $25 million. U.S. Nuclear Regulatory Commission, *1981 Annual Report* at 107.

plicable to strict liability, statutes of limitations, and immunities). *Cavers, Improving Financial Protection of the Public Against the Hazards of Nuclear Power*, 77 Harv. L. Rev. 644 (1964). He had testified before the Joint Committee in *1965* in support of his proposal, *1965 Hearings, supra* n. 36, at 211-223, and his law review article was made an exhibit to those hearings, *id.* at 396-440. While Congress deferred consideration of his proposal until 1966, Chairman Holifield explained in 1966 that "[h]is testimony before the Joint Committee last year was largely influential in the committee's decision to proceed with the hearings which are being conducted today," *1966 Hearings* at 80.

Professor Cavers' law review article, in addition to the other suggestions that ultimately were adopted by Congress, proposed two amendments that would go to the "measure of damages". 77 Harv. L. Rev. at 662-664; *1965 Hearings* at 414-416. One of these was that "recovery of punitive damages should be denied in all nuclear cases", 77 Harv. L. Rev. at 663-664; *1965 Hearings* at 415-416. In this regard, he noted that Congress had included an express prohibition against punitive damages in the Federal Torts Claims Act, 28 U.S.C. § 2674 (*Ibid*).

Professor Cavers' suggestion was not prompted by the consideration that fueled the Tenth Circuit in this case (*i.e.*, that punitive damages "compete" with the federal regulatory scheme), but rather by his belief that as a matter of policy they ought not to be available against operators covered by Price-Anderson. Given that Kerr-McGee was not covered by Price-Anderson (see n. 32, *supra*), Professor Cavers' proposal presumably would not have been applicable to this case. But Congress, although adopting most of Professor Cavers' suggestions, did not adopt his suggestion that punitive damages be prohibited. On the contrary, as the Joint Committee's report emphasized, "this bill in no way provides for deprivation of a claimant's existing rights" (*supra*, p. 36). Thus, Professor Cavers' proposal respecting punitive dam-

ages is significant only for its implicit premise that without an express statutory exclusion punitive damages could be recovered in suits covered by the Price-Anderson Act, and for the fact that Congress, although adopting most of his suggestions, did not enact a prohibition against punitive damages.

(5) *The AEC's Implementation of the 1966 Amendments*

The 1966 Price-Anderson amendments assigned the AEC the responsibility for designing revised insurance and indemnity agreements that would incorporate the waivers. 42 U.S.C. § 2210(n)(1). The AEC's implementation of that responsibility makes unmistakably clear that the AEC understood that federal law did *not* preempt punitive damages claims, even against operators covered by Price-Anderson, and even in the case of ENO's.

The insurance agreement and indemnity agreement contained in the AEC's proposed rule, after reciting the waivers being made by covered operators in the event of an ENO (including waivers of state statutes of limitations and state-conferred immunities from suit),[40] contained the following provision:

> The waivers set forth above . . . do not apply to—
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> • • • •
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> Any claim for punitive or exemplary damages . . .[41]

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[40] 33 Fed. Reg. 6978, 6984, 6985, 6986 (1968).

[41] *Ibid.* As originally proposed, and as it exists today, 10 C.F.R. § 140.91, Appendix A, para. 2(c) at 730, this clause is followed by a proviso:

> provided, with respect to any claim for wrongful death under any State law which provides for damages only punitive in nature, this exclusion does not apply to the extent that the claimant has sustained actual damages, measured by the pecuniary injuries resulting from such death but not to exceed the maximum amount otherwise recoverable under such law.

The reason for this proviso is evident from the description that follows in text: Congress wanted waivers of state law sufficient to assure recovery of compensatory damages.

The rule was adopted in the form proposed, and has remained the same over the ensuing 15 years.[42] Thus, a covered operator sued in an ENO has not waived the right to resist a punitive damages claim on the ground that the state statute of limitations has run, or that the operator enjoys charitable or governmental immunity under state law. The AEC explained its reason for including this limitation upon the waivers:

> It has also been deemed advisable to make the waivers inapplicable to claims for punitive or exemplary damages, since the intent of the legislation is to assure compensation for injury or damage from an extraordinary nuclear occurrence. [33 Fed. Reg. 6982 (1968).]

"[T]he legislation" whose intent is referred to is the 1966 Act amending Price-Anderson, the only Act that assures compensation for injury from an ENO. As the intent of that Act in requiring waivers was to assure *compensation* notwithstanding state limitations and immunity laws, the AEC was entirely correct in its conclusion that the Act should not be implemented to intrude upon state law by making available punitive damages *in circumstances where the state law would not permit them* (*i.e.*, where they are barred by the statute of limitations and/or by the defendant's charitable or governmental immunity).

For purposes of the present case, the importance of the AEC's conduct is its recognition that punitive damages are not preempted, even in the case of an operator covered by Price-Anderson who has caused an ENO. For if they *were* preempted, there would have been no reason to preserve the operator's entitlement to invoke state limitations and immunity defenses. And it follows *a fortiori* that the AEC recognized that punitive damages are not preempted in a minor incident (*i.e.*, one not an ENO) or one caused by an operator not covered by Price-Anderson, for the legislative materials we have quoted make clear

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[42] 10 C.F.R. § 140.91, App. A, ¶ 2(c) at 730; § 140.92, Art. II, ¶ 5(d) at 735.

Congress' intent not to intrude at all on the operation of state law in those situations.

The contemporaneous views of an administrative agency charged with initial implementation of a new federal statute are, of course, entitled to great weight. *Power Reactor Co. v. Electricians*, 367 U.S. 396, 408 (1961) (Atomic Energy Commission); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933); *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981). This is especially so here, for the AEC played a key role in the shaping of the 1966 legislation,[43] and likewise had actively participated in the congressional consideration of each of the bills that collectively contributed to the corpus of atomic energy law through 1966.[44]

(6) *Extension of Price-Anderson in 1975*

In 1975, Congress extended the life of Price-Anderson for another ten years. P.L. 94-197, 89 Stat. 111. The Joint Committee's report reiterated that state tort law governs damage actions except in the instances enumerated in the Act, and the 1975 Act did not alter that enumeration. S. Rep. No. 94-454, *supra*, at 7-9.[45]

(7) *Conclusion Respecting the Congressional Intent*

In sum, there is not a word in the statute, nor in the legislative history spanning several decades of amendments,

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[43] See pp. 30-33, 35, *supra*; see also S. Rep. No. 1605, *supra*, at 4-5 (1966).

[44] S. Rep. No. 1699, *supra*, at 3 (1954); S. Rep. No. 296, *supra*, at 1-4, 7 (1957); S. Rep. No. 870, *supra*, at 3-7 (1959); S. Rep. 650, *supra*, at 2, 13 (1965).

[45] The 1975 amendments provided for a "phase out" of government indemnity, with industry-financed protection filling the gap. S. Rep. No. 94-454, *supra*, at 9-10. By 1981, the "phase out" had progressed to the point that the first $535 million of protection was provided through industry-financed means, and the government indemnity had been reduced to the $25 million necessary to cover losses exceeding $535 million up to the $560 million limit of liability. NRC 1981 Annual Report, *supra*, at 106-107.

suggesting that Congress intended to take from the states their traditional power to authorize punitive damage awards when tortious conduct has been accompanied by a culpable state of mind.[46] On the contrary, Congress repeatedly announced that state tort law is to control unqualifiedly in the resolution of damage actions against nuclear operators (such as appellees here) not covered by Price-Anderson, and that even in the case of operators covered by Price-Anderson state tort law is to control except to the limited extent that it has been expressly overridden in the federal statute. Those instances of federal intrusion are clearly spelled out in the statute, and punitive damages are not among them; indeed, the one suggestion that federal law should preempt punitive damages was not adopted (pp. 36-38, *supra*). Moreover, the Atomic Energy Commission—the administrative agency responsible for implementing the federal statute—demonstrated contemporaneously with passage of the 1966 amendments its understanding that punitive damages claims are not preempted (pp. 38-40, *supra*).

B. The Decision Below Rests On Defective Premises

As we have seen, Congress has repeatedly and unequivocally declared a purpose *not* to preempt traditional state law tort remedies. That evidence provides the complete answer to the preemption issue presented in this case.

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[46] Congress understood that tort rules varied from state to state, and its intent was to leave the states free to apply their tort rules *whatever* they might be (pp. 32-34, *supra*). It is noteworthy that in both 1957 and 1966 all but a handful of states authorized punitive damages in tort actions. Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 518 (1957); Prosser, *Handbook of the Law of Torts* (2d Ed. 1955) at 9. While the grounds upon which punitive damages could be awarded varied between the states, the predominant view in 1957 and 1966 was that they were available where the defendant's culpable conduct stemmed from either an intent to harm or a reckless disregard of the safety of others. *Restatement of the Law of Torts* (1939), § 908, comment b; Prosser, *supra*, at 9-10; McCormick, *Handbook of the Law of Damages* (1935), at 280-281; Note, *supra*, 70 Harv. L. Rev. at 517.

The court below, disregarding that evidence, chose instead to resolve the preemption issue as if Congress had been silent on the question. The court below looked to Congress' treatment of a *different* question—the role reserved to the federal government in licensing and administratively regulating nuclear safety—and derived its solution by logical inference from Congress' decision there. But when Congress gives direct evidence of its intent respecting preemption, a contrary intent is not to be derived by abstract logic and inference. Moreover, even on its own terms, the decision below cannot survive analysis.

The court below found preemption by the following reasoning: The Atomic Energy Act, as amended, places administrative regulation of radiation hazards at private nuclear facilities exclusively in the hands of the AEC (NRC); "[a] judicial award of exemplary damage under state law [is] punishment for bad practices or to deter future practices involving exposure to radiation"; and, therefore, an award of punitive damages "competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material." App. 23a-24a.

This reasoning misapprehends both the nature of punitive damages and the relationship of such damages to the scheme Congress has adopted to govern hazards and injuries caused by exposure to radiation emanating from privately-owned nuclear facilities. When these factors are properly understood, there is no tension between the power to award punitive damages in cases such as this and the federal regulatory scheme.

1. Even the court below recognized (App. 18-20) that Congress did not leave *all* "regulation" of radiation hazards solely in the hands of federal authorities. The court below understood that Congress unquestionably left to state tort law the task of providing compensatory damages for injuries suffered from radiation hazards at pri-

vate nuclear facilities, and the power to determine the criteria by which liability for such damages would be adjudged. And it is axiomatic that the power to set the standards for tort liability and to award compensatory damages pursuant to those standards carries with it the ability to regulate primary conduct. As this Court recognized in *San Diego Unions v. Garmon*, 359 U.S. 236, 247 (1959):

> [R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.

See also, *Smith v. Wade*, —— U.S. ——, 51 L.W. 4407, 4413 (Apr. 20, 1983). For example, the court below understood that even if a nuclear operator has fully complied with the regulatory standards imposed by federal law and federal agencies, Congress intended that the states would be free to impose—as Oklahoma has—compensatory liability under a strict liability standard (App. 18a-20a). The effect of that congressional judgment is to create an incentive for nuclear operators in states like Oklahoma to achieve a level of safety beyond that imposed by federal regulations. Thus, the premise of the court below—that any element of state tort law that is "regulatory" in nature "competes" with the federal regulatory scheme and should be deemed preempted—is flatly at odds with its own recognition of Congress' intent to permit recovery of compensatory damages under state law standards.

2. Punitive damages do not regulate any practices involved in the operation of nuclear facilities that are not subject to regulation by compensatory damages. Indeed, punitive damages involve less direct regulation of safety practices than compensatory damages. While compensatory damages serve to regulate directly the practices of private nuclear operators with respect to radiation has-

ards, punitive damages serve a quite different interest—one that belongs peculiarly to the states. Punitive damages are not awarded based on the level of radiation that may have been emitted at a particular facility—which is the subject of federal interest and regulation. Punitive damages are awarded because, whatever the level of radiation emission, injury has resulted from "outrageous" conduct on the part of the defendant. Thus, as explained in the *Restatement of the Law of Torts, Second* (1977):

> [T]hese damages can be awarded only for conduct for which this remedy is appropriate—which is to say, conduct involving some element of outrage similar to that usually found in crime. The conduct must be outrageous, either because the defendant's acts are done with an evil motive or because they are done with reckless indifference to the rights of others . . . Reckless indifference to the rights of others and conscious action in deliberate disregard of them . . . may provide the necessary state of mind to justify punitive damages [§ 908, comment b].

The "distinctive feature" of punitive damages is that "a positive element of conscious wrongdoing is always required". *McCormick on Damages* 280 (West, 1935). "Exemplary damages are awarded only when the defendant's behavior resulted from an evil state of mind, such as spite, ill-will, or recklessness." Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517 (1957). Accord: *Prosser on Torts* 9-11 (4th Ed. 1971).[47] In this light, it is hardly surprising that there

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[47] See also, *Smith v. Wade*, —— U.S. ——, 51 L.W. 4407, 4409-10 n.6, 4419-20 (Apr. 20, 1983), in which both the majority and dissenting opinions recognize that in modern jurisprudence a culpable subjective state of mind is the prerequisite to awarding punitive damages. The Oklahoma punitive damages statute, as implemented by the trial judge in this case, fully accords with this conception of the role of punitive damages. By its terms, the Oklahoma statute authorizes punitive damages "where the defendant has been guilty of oppression, fraud or malice, actual or presumed". 23 O.S.

[Footnote continued on page 45]

is no prior case involving any federal statute in which punitive damages under state law were held preempted by federal law when compensatory damages were not.

3. States have a special interest in policing conduct motivated by a malicious or reckless state of mind that endangers the health and safety of their citizens—whether that conduct involves operating a nuclear facility or driving a car. And, there is no federal interest in sheltering those who act with such motivation from the punishment the state law provides. The words of this Court in *San Diego Unions v. Garmon*, 359 U.S. at 243-244, are in point here:

> [D]ue regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the [federal statute]. . . . Or where the regulated conduct touched

---

[47] [Continued]

§ 9. The phrase "malice . . . presumed" has been construed in Oklahoma decisional law to mean "disregard for the public safety [that] reflects a basic disrespect for the interests of others." *Thiry v. Armstrong World Industries*, —— P.2d ——, 54 Okla. Bar. Assn. Journal, 782, 785 (1983).

> "Reckless disregard" is not to be confused with inadvertent conduct. To meet this standard the [wrongdoer] must either be aware of, or culpably indifferent to, an unnecessary risk of injury [*Ibid*].

See also, *Dayton Hudson Corp., supra*, 621 P.2d at 1161 and n.25 ("positive wrongdoing", which includes " 'reckless disregard' of the safety of others"); *Chicago, R.I. & P. Ry. Co. v. Wells*, 156 P. 314, 315 (1916) ("reckless disregard of the rights of others"). Consistent with this standard, the trial judge charged the jury in this case that the prerequisite for an award of punitive damages was "evil intent," a state of mind consisting of either ill-will or reckless disregard (App. 112a-113a). By its award of punitive damages, the jury found that Kerr-McGee possessed the requisite culpable state of mind; the trial judge held that that finding was supported by the evidence; and the court below did not disturb that holding.

> interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.

See also, *e.g.*, *United Automobile Workers v. Russell*, 356 U.S. 634 (1958); *United Construction Workers v. Laburnum Corp.*, 347 U.S. 656 (1954).

As shown by cases like *Russell* and *Laburnum*, in which the issue concerned preemption of compensatory and punitive damages by the National Labor Relations Act, this Court has refused to abrogate those state tort rights that are "deeply rooted in local feeling and responsibility" even where, unlike here, Congress has otherwise generally preempted state law tort actions in favor of a federal adjudicatory scheme that provides remedies to injured persons. In that regard, this Court's decision in *Farmer v. Carpenters*, 430 U.S. 290, 302 (1977) is particularly instructive:

> No provision of the National Labor Relations Act protects the "outrageous conduct" complained of by petitioner Hill in the second count of the complaint. Regardless of whether the operation of the hiring hall was lawful or unlawful under federal statutes, there is no federal protection for conduct on the part of union officers which is so outrageous that "no reasonable man in a civilized society should be expected to endure it." . . . Thus, as in *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966), and *Automobile Workers* v. *Russell*, *supra*, permitting the exercise of state jurisdiction over such complaints does not result in state regulation of federally protected conduct.
>
> The State, on the other hand, has a substantial interest in protecting its citizens from the kind of abuse of which Hill complained.

4. The court below thought, however, that preemption of punitive damages was dictated by this Court's summary affirmance of *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035

(1972). The points already made show why *Northern States* is inapplicable here.

In that case, the Minnesota Pollution Control Agency conditioned issuance of a waste disposal permit to a nuclear power plant upon the plant's meeting state-prescribed standards for the discharge of radioactive effluents that were more stringent than those prescribed by the AEC. This was, of course, a classic case of overlapping administrative regulation dealt with in the amendments enacted by Congress in 1959, 42 U.S.C. § 2021, and the *Northern States* court found its answer (that the state's regulation was preempted) solely from consideration of that 1959 legislation. Key to the *Northern States* decision was the provision in the 1959 legislation codified as 42 U.S.C. § 2021(k):

> Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

Although the 1959 legislation did not in terms prohibit state agencies from imposing standards for the discharge of radioactive effluents more stringent than the AEC's standards, the court in *Northern States* drew from § 2021(k) the negative inference that the 1959 Act *did* deny State and local agencies the right to regulate for the purpose of "protection against radiation hazards" and thus preempted the regulation attempted by the Minnesota Pollution Control Agency, 447 F.2d at 1149-50.

As we have seen, the role of state law in damage actions was not the subject of Congress' consideration in 1959, and that role is not controlled by the 1959 legislation. While state regulatory agencies may not prescribe regulatory standards more stringent than the AEC's, it hardly follows that state laws cannot authorize punitive damages for reckless disregard of the safety of others.

Moreover, even if § 2021(k) were the appropriate place to look for Congress' intent respecting punitive

damages, punitive damages are designed for "purposes other than protection against radiation hazards". As shown *supra*, at pp. 43-46, the punishment and deterrence that punitive damages are designed to accomplish are not directed to particular levels of radiation emission or indeed to radiation hazards at all; rather, the state seeks to punish and deter conduct—whatever its particular manifestation—that is outrageous. If a corporate board of directors acted to rid itself of a particularly annoying critic of nuclear power by mixing plutonium from the plant into food served that critic, it could hardly be contended that a state court, by awarding punitive damages, was doing so for the "purpose" of "protection against radiation hazards" in the sense Congress intended by those words. The purpose actuating the state court in those circumstances would have been idenical, and the award of punitive damages the same, if the particular poison used had been cyanide rather than radiation. The state court would be punishing and deterring outrageous conduct, not regulating exposure to plutonium. Indeed, it would be wholly irrelevant to a state court in such a case what *quantity* of plutonium was employed for the poisoning, or whether that quantity was within or without the numerical exposure limits stated in AEC regulations. For the state would not be protecting against radiation hazards as such, but against "bad actors"—persons (or corporations) whose conduct results from attitudes towards the health and safety of others that do not adhere to civilized standards.

And, of course, it should not be overlooked that if punitive damages are preempted, so equally would be criminal penalties, for which punitive damages are a civil analogue. (Prosser, 4th Ed., *supra*, at 9; Restatement (Second), *supra*, § 908, comment a.) The court below implicitly recognized that its decision meant that both were preempted; it found that result appropriate, for:

> The AEC (NRC) has comprehensive powers to punish and prohibit practices it regards as improper, through its power and responsibility to license, 42 U.S.C. § 2131, investigate, *id.* § 2271, enjoin, *id.* § 2280, and seek civil and criminal penalties. *Id.* §§ 2272, 2273, 2282 [App. 24a].

The court below ignored that the practices the AEC (now NRC) "regards as improper" are not coincident with those that Congress left the states free to "regard as improper" in the application of their tort law. The NRC can seek punishment of violations of its regulations, *e.g.*, exposures exceeding the limits prescribed in its regulations. But the NRC cannot seek punishment for murder, nor for actions taken in reckless disregard of the safety of others, except where coincidentally those actions—independently of the state of mind actuating them—happen to violate NRC regulations. And even where that coincidence exists, the crux of the federal interest—the reason that Congress preempted *administrative* regulation of radiation hazards—lies in assuring the objective safety of nuclear facilities, not in punishing those who operate them with a malevolent or reckless state of mind.

In sum, the function of punitive damages in Oklahoma—to punish and deter conduct actuated by ill-will or reckless disregard for the rights of others—is wholly peripheral to federal regulatory concerns, but is at the core of "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Garmon*, 359 U.S. at 244. As we have seen, there is not here the requisite "compelling congressional direction" to preempt state tort law; there is, to the contrary, a clear and consistent congressional directive that state tort law is to govern.[48]

---

[48] Because the congressional intent not to preempt is so clear, we do not present a full argument on the constitutional question that

CONCLUSION

For the reasons set forth above, the decision below should be reversed.

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would be presented if Congress *had* acted to preempt. Under Oklahoma's statute, plaintiff had a right to submission of her punitive damages claim to a jury—a property right protected by the Fourteenth Amendment, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). That right has proved in this instance to be of great monetary value. Congress did not provide a federal scheme for regulating culpably-motivated conduct that adequately substitutes for that provided by Oklahoma's punitive damage statute, nor did Congress make any determination that there was a federal interest that would be served by preemption. In these circumstances, a congressional decision to preempt would be "demonstrably arbitrary or irrational." *Duke Power Co.*, *supra*, 438 U.S. at 84.

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IN THE

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OCTOBER TERM, 1982

BILL M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, Deceased,

Appellant,

v.

KERR-McGEE CORPORATION, a Delaware corporation, and KERR-McGEE NUCLEAR CORPORATION, a Delaware corporation,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction of the appeal.

2. Whether an award of punitive damages with respect to a claim based on radiation hazards resulting from the operation of a federally licensed and regulated plutonium plant is pre-empted by the Atomic Energy Act.

3. Even if not so preempted, can such an award stand when its personal injury predicate is barred by the exclusive Oklahoma workers' compensation remedy.

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Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR APPELLEES

JURISDICTION

The appellees urge that the Court is without jurisdiction to hear this appeal. In its order of January 10, 1983, the Court postponed consideration of that question until the hearing of the case on the merits. Accordingly, the appellees' discussion of the jurisdiction issue is set forth in Section I of the Argument, *infra.*

STATEMENT

The one-sided nature of appellant's Statement of the Case requires some restatement of the facts.[1] Moreover, since the appellant has chosen to argue a number of matters irrelevant to the questions presented, the appellees are compelled to set forth more facts than are strictly necessary to decide the narrow issues presented.

A. The Facts

Karen Silkwood was a laboratory analyst employed by Kerr-McGee at a federally licensed and regulated plutonium fuel fabrication facility located in Oklahoma.[2] She was exposed to plutonium at the plant on November 5th and 6th, 1974, and on November 7th in her apartment in a job-related incident at which time some of her personal property was also contaminated. Silkwood told both an AEC investigator and the head of Kerr-McGee's health physics department that the exposure at her apartment occurred when she spilled a urine sample that she was collecting at the direction of her employer (II J.A. 740, IV J.A. 1298-99, 1377-78). The appellant has conceded throughout that there is no proof as to how the plutonium got from Kerr-McGee's plant to Silkwood's apart-

[1] Record citations herein are as follows: "J.S.App." refers to the Appendix accompanying Appellant's Jurisdictional Statement; "J.A." refers to the five volume Joint Appendix in the Tenth Circuit and is cited by "(Volume) J.A. (page)"; "Tr." refers to the transcript of proceedings in the trial court. A listing of the corporate affiliations of Kerr-McGee Corporation and Kerr-McGee Nuclear Corporation is contained at p. 22 of the Motion to Dismiss or Affirm.

[2] The license to receive and process special nuclear materials was granted to Kerr-McGee on April 2, 1970 by the Atomic Energy Commission ("AEC") pursuant to the Atomic Energy Act of 1954 and 10 C.F.R. Parts 40 and 70. The operations of the plant were thereafter subject to pervasive AEC regulation (Def. Exh. 1, R. Vol. 15, Tr. 7864; Def. Exh. 2, R. Vol. 16, Tr. 7867; Tr. 7840-7872).

ment or how she became exposed.[3] It was also admitted at trial that certain of the urine samples which Silkwood turned in for analysis were "spiked" or "salted" with plutonium that was not excreted in her urine (Tr. 543, II J.A. 784).

Kerr-McGee followed proper health physics procedures and immediately decontaminated Silkwood after each exposure. In addition, Kerr-McGee promptly made available to Silkwood medical care and treatment, which was given as soon as she would consent to receive it.[4] Kerr-McGee made special arrangements to send her to the medical facility at Los Alamos Scientific Laboratories at Los Alamos, New Mexico for testing and evaluation by specialists in radiation injury (Tr. 7043-7044).

The AEC conducted a prompt and thorough investigation of Silkwood's exposure.[5] The Commission's report concluded

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[3] In his opening statement, counsel for Silkwood told the jury: "Well, I don't know how Karen Silkwood got contaminated, and if I were to stand here and speculate with you I would be guilty of the same misconduct that you will soon hear from the defense" (III J.A. 902). *See also* Tr. 3443.

[4] On November 7th, Silkwood would not consent to examination by Kerr-McGee's specially trained plant physician (Tr. 4720-4722; 4766-4767; 7035). On November 8th, on the advice of a union colleague who flew to Oklahoma City from Washington, D.C., she isolated herself from Kerr-McGee. On November 9th, she did consent to examination by Kerr-McGee's medical consultant, and on November 10th was flown to Los Alamos (Tr. 7043-7064; Pl. Exh. 188, II J.A. 430-432, Tr. 3799). The appellant refers to "an unauthorized and dangerous drug" offered to Silkwood in the course of treatment (Appellant's Br. 13, n.22). The appellant's reference is to DPTA, a chelating agent which could remove plutonium from the body, which had been recommended by Kerr-McGee's medical consultant (II J.A. 430). The source of supply of the drug was the AEC, which along with the International Commission on Radiation Protection sanctioned its use (Tr. 5800-5801, 7080-7089).

[5] The investigation report, which contains a detailed chronology of events relating to Silkwood's contamination, is Def. Exh. 37 (II J.A. 729-790, Tr. 6154). The report shows that the amount of plutonium involved in the incident was estimated to have been less than 0.0003 grams (II J.A. at 734).

that Silkwood's exposure to plutonium was less than 25% of the permissible occupational body burden recognized by the authoritative national and international commissions and by the AEC (IV J.A. 1586-1589; II J.A. 809-813).[6] The testimony of the two medical experts in the field of radiation medicine who examined and tested Silkwood was that she had no cognizable physical injury; that her exposure to plutonium was not significant enough to cause a medically detectable injury; that based on reasonable medical certainty, she would have no adverse health effects from her exposure; and that long term studies of persons having greater exposure than she had demonstrated that there had been no significant health impact (Voelz, Tr. 9091-9202; Sternhagen, Tr. 7077-7080; IV J.A. 1431-1440; IV J.A. 1559-1605).[7]

After the job-related plutonium exposure in the apartment on the morning of November 7th, decontamination became

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[6] Silkwood's body burden of plutonium was 8.8 nanocuries. The permissible body burden for occupational exposure was 40 nanocuries. Her lung burden was 5 nanocuries; the permissible lung burden was 16 nanocuries (Tr. 7078; Def. Exh. 37 at II J.A. 752, 783). The permissible body burden is the exposure level at which there is a negligible probability of injury and at which effects likely to occur are of such a minor nature as not to be considered unacceptable by the exposed individual or by competent medical authorities (II J.A. 544). Lower courts have recognized that the recommendations of the International Committee on Radiation Protection (ICRP) and of the National Council for Radiation Protection (NCRP) are set to provide a safe margin between industrial practice and the level which would produce harmful effects. Mahoney v. United States, 220 F. Supp. 823, 838 (E.D. Tenn. 1963), *aff'd*, 339 F.2d 605 (6th Cir. 1964); Crowther v. Seaborg, 312 F. Supp. 1205, 1230-35 (D. Colo. 1970).

[7] The trial testimony on which the appellant relies to support a determination of personal injury is that of Dr. John W. Gofman. Gofman challenged the recognized national and international commissions charged with the duty of recommending acceptable levels of radiation exposure for employees at nuclear facilities. His views are known to these commissions as well as to the AEC, but each continues to adhere to existing standards (III J.A. 962-969).

necessary and was required by the AEC (II J.A. 748-749; 757-762). It was necessary to remove items of Silkwood's furniture, as well as a quantity of smaller articles. The parties stipulated that the items removed had a total value of $5,000.

All aspects of plant safety and operations which the appellant discusses (Appellant's Br. 12-14) were subject to extensive regulation by the AEC. The AEC's report of investigation of Silkwood's exposure includes an analysis of Kerr-McGee's physical security program (II J.A. 742) and Kerr-McGee's health physics records (II J.A. 745-746). The AEC concluded that Kerr-McGee's only violation of regulations throughout the entire Silkwood incident was a failure to maintain a record of the dates of two urine samples submitted by Silkwood (II J.A. 734). This violation, which occurred because Silkwood failed to supply Kerr-McGee with the dates, was not causally related in any way to her exposure or the exposure to her personal property. In all material matters, Kerr-McGee was in compliance with federal regulations as they pertained to the Silkwood incident.

The design of Kerr-McGee's plant, the equipment, and the processes utilized in the plant were "state of the art" and were approved by the AEC (Tr. 5497). James Keppler, Regional Director of the AEC with jurisdiction over the Kerr-McGee plant, testified that there were no serious personnel exposures at the plant; that Kerr-McGee did not exceed the regulatory requirements with respect to exposure levels that would result in significant health hazards; that the AEC viewed the plant as a "safe operation"; and that he never at any time considered the plant to be a hazard either to the workers or the public.[8]

[8] On September 27, 1974, Silkwood and two other local OCAW union committee members made allegations to the AEC concerning working conditions at the plant. Thirty-nine separate incidents or situations referred to by the OCAW were investigated (Def. Exh. 38, II J.A. 791-808, Tr. 4251-4252). Three violations of the lowest order of severity (Category III) were noted (II J.A. 793-794). None relates to Silkwood's exposures or to contamination of the apartment.

Although the AEC had the power to close the plant, that was never considered, and operation of the plant never resulted in a fine by the AEC or even a recommendation that a fine be levied (Tr. 8157-58; 8254-58).[9]

Among the numerous misleading statements about plant operations, the appellant implies that there was missing plutonium (Appellant's Br. 14). During operation of the plant, problems which were common in the industry were encountered relating to the complex task of measurement of the inventory of plutonium. When improved measurement techniques were developed, Kerr-McGee's accounting for plutonium was found to be in substantial compliance with the regulations,[10] as the undisputed testimony shows (see Tr. 7890-7919; 8531-8545). Kerr-McGee's compliance was independently verified at the direction of the Nuclear Regulatory Commission ("NRC") (successor to the AEC) by two independent laboratories engaged by the Department of Energy (Pl. Exh. 83, R. Vol. 13, Tr. 8038; Tr. 7909-10; 8542-48).

The appellant's assertions about documents never located after Silkwood's auto accident, allegedly defective fuel rod

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[9] Appellant relies almost exclusively on the testimony of Karl Z. Morgan as authority for criticism of plant operations (Appellant's Br. 12-14). Morgan had never been to the plant and had never interviewed any of the health physics personnel or even anyone who had ever worked at the plant. He was critical of the AEC and other regulatory agencies and expressed the opinion that the current radiation exposure levels accepted by the AEC for occupational workers were too high by a magnitude of 480 (Tr. 1637-1720; 1749-1760).

[10] The AEC requirement as to inventory is to account within a tolerance of one-half of one percent of plutonium received, or not less than 99.5 percent. Kerr-McGee accounted for 99.478 percent (Tr. 7905-7909).

welds,[11] and claims of safety violations (Appellant's Br. 11, n. 18) are likewise without foundation. The appellant is his own authority for these declarations, citing Addendum B to Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc (J.S.App. 132a-136a) consisting of twenty-seven separately numbered and largely unsupported claims of the appellant, substantially all of which are in dispute.

B. The Tenth Circuit Opinion

The Tenth Circuit held that: (a) the claim for personal injuries to Karen Silkwood was subject to the Oklahoma Workers' Compensation Act, which constituted the exclusive remedy, as the evidence supported only the conclusion that her exposures to plutonium were all job-related (J.S.App. 13a-18a); (b) the $5,000 property damage award should be affirmed upon the application of Oklahoma law of strict

[11] As to the suggestion that Kerr-McGee was manufacturing defective fuel rod welds, these matters were thoroughly investigated by the AEC and the Energy Research and Development Administration ("ERDA"). It was concluded that Kerr-McGee's fuel pins met all established contract requirements and that the quality assurance program also met those requirements. See AEC Report of Investigation (Def. Exh. 98, R. Vol. 19, Tr. 6721, 9731), and ERDA Reports of Investigation (Def. Exh. 99, R. Vol. 19, Tr. 6723, 6729; Def. Exh. 100, R. Vol. 19, Tr. 6754, 9731). The confusion on this issue results from the actions of one laboratory analyst who "touched up" anomalies of negatives of certain photomicrographs of certain test welds with a felt tip pen, in order that the negatives would print a clear photo. However, contrary to the appellant's misstatement, none of the markings was used to obscure weld defects (Tr. 6748). These actions were without the knowledge of supervisory personnel and in any event did not involve or affect the manufactured pins or the quality assurance program (Tr. 6665-6764). The signed statement of the laboratory analyst was obtained by the AEC and appears as Exhibit G to Defendant's Exhibit 98, in which it is stated that the anomalies on the negatives were the result of defects in the film emulsion and were not indicative of flaws in the test welds.

liability, plutonium having escaped from the Kerr-McGee plant and being a toxic and dangerous substance, and the property damage caused by plutonium contamination being foreseeable (J.S.App. 18a-21a); and (c) no punitive damages may be awarded in this case by reason of federal preemption (J.S.App. 21a-24a).[12]

The Tenth Circuit reversed the punitive damage verdict because exclusive regulatory authority over radiation hazards is granted to the AEC by the Atomic Energy Act of 1954. The court held that a judicial award of punitive damages under state law to punish or deter alleged unsatisfactory practices involving exposure to radiation has a regulatory effect and is no less intrusive than direct legislative regulation of radiation hazards by a state and is, therefore, preempted by federal law. In view of its decision on federal preemption, the Tenth Circuit considered none of Kerr-McGee's other arguments as to the impropriety of punitive damages in this case (J.S.App. 21a).

C. Present Posture of the Case

It is important to note the posture in which the decision of the Tenth Circuit leaves this case. Since the court held that the Oklahoma Workers' Compensation Law bars Silkwood's personal injury award (a holding which is not under review here), that award no longer provides a predicate or basis for the $10,000,000 punitive damage award. The only compensatory verdict remaining in this case is the property damage award of $5,000—the stipulated value of Silkwood's furnishings—from which Kerr-McGee has not appealed. The Tenth Circuit's holding that the punitive damage award was preempted under the Atomic Energy Act is therefore the only holding that has been appealed. Thus, the preemption issue before this Court can relate only to the punitive damage award insofar as it is

[12] The Opinion was by a divided court. But even the dissenting Judge would have reversed the trial court on the workers' compensation issue for not submitting the issue to the jury (J.S.App. 29a-30a).

predicated upon the property damage award. If preempted, the punitive award must fail. If there is not a proper predicate, it must likewise fail. Only if both of these propositions are rejected would the case be properly remanded for consideration of the other issues not yet considered by the Tenth Circuit.

SUMMARY OF ARGUMENT

This case is not properly before the Court on appeal under 28 U.S.C. § 1254(2) because the court of appeals did not hold the Oklahoma punitive damage statute invalid. The case should therefore be dismissed (pp. 12-16, *infra*). If not dismissed, the arguments which follow require affirmance of the court of appeals' decision.

This Court's decision in *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, ____ U. S. ____, 103 S.Ct. 1713 (1983) firmly establishes that the federal government has occupied the field of regulating radiation safety in connection with the operation of nuclear facilities and the handling of nuclear materials. Thus, any state regulation of radiation hazards is preempted. The government has exercised its authority in this field by way of a comprehensive regulatory and licensing scheme, through which the Nuclear Regulatory Commission is able to monitor every aspect of the production of nuclear energy (pp. 17-23, *infra*).

The judicial award of punitive damages in this case is an attempt to regulate nuclear safety and falls squarely within the field occupied by the federal government (pp. 24-30, *infra*). The punitive damages were awarded in connection with Karen Silkwood's exposure to plutonium, a radioactive substance, at the Kerr-McGee plant and in a job-related incident at her apartment. The purpose of the award was to punish Kerr-McGee for maintaining allegedly unsafe plant conditions and for "permitting" the escape of plutonium. The punitive damages were intended to deter Kerr-McGee from continuing such alleged practices and to prescribe the manner in which Kerr-

McGee was to conduct operations in its plant. Regulation of a federal nuclear licensee's conduct by imposition of punitive damages is "no less intrusive than direct legislative acts of the state," as the court below held (J.S.App. 24a). Indeed, because of the arbitrary and uncontrollable nature of such awards, they can be a great deal more intrusive. Since the duties of punishing and deterring the conduct of nuclear operators relating to radiation hazards were never ceded to the states, this assertion of authority by a state is preempted. Silkwood's attempt to circumvent this conclusion by claiming that the award of punitive damages was for "purposes other than regulation of radiation hazards" is without merit since all the alleged conduct supposedly underlying the award concerned radiation safety at Kerr-McGee's federally licensed operation.

In addition, the imposition of punitive damages frustrates the objectives of Congress in several important ways (pp. 30-34, *infra*). The availability of huge punitive awards could impede the stated purpose of the Atomic Energy Act to promote the development of nuclear energy. Congress has also made clear that it does not want a system of dual regulation of radiation hazards—a problem which will necessarily occur if punitive damages are permitted here.

Silkwood's references to the legislative history of the Price-Anderson Act do not alter this conclusion (pp. 34-39, *infra*). Nothing in that Act or its legislative history authorizes the imposition of punitive damages for radiation accidents, and nothing therein grants to the states the authority to punish and deter the conduct of nuclear licensees. The Act creates a compensation system, and Congress' references to non-interference with state tort law must be read as referring to state tort law for purposes of compensation only.

The court below found it unnecessary to consider any ground other than preemption in reversing the award of punitive damages. However, another compelling ground supports the court's action (pp. 41-46, *infra*). When the court of

appeals vacated Silkwood's claim for personal injuries on the ground that it was covered by the workers' compensation act, there was no longer any basis for the punitive damage award. The award was clearly incident to the personal injury claim. Since the trial court had no jurisdiction over the personal injury claim, the punitive damages predicated on that claim cannot stand. This constitutes an independent ground for affirming the decision of the court of appeals without the necessity of determining the preemption issue.

ARGUMENT

I.

THIS CASE IS NOT PROPERLY BEFORE THIS COURT ON APPEAL

This case does not fall within the narrow class of cases that may be appealed under 28 U.S.C. § 1254(2), in which Congress authorized review on appeal in only one instance—when the court of appeals has held a state statute "to be invalid as repugnant to the Constitution, treaties, or laws of the United States." This Court has emphasized its "practice of strict construction of statutes authorizing appeals," *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970), and has closely scrutinized the decisions of the courts of appeals to determine whether a state statute has been held invalid on federal grounds.

The state statute asserted to provide the basis for jurisdiction is the Oklahoma punitive damages statute, Okla. Stat. Ann. tit. 23 § 9 (West 1955), which permits a jury to award exemplary damages where a defendant has been guilty of oppression, fraud or malice. However, the court of appeals did not hold this statute invalid, either on its face or as applied. The court was concerned only with interpreting the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*, and with determining whether an award of punitive damages fell within the federally-occupied field of radiation hazards. It held that because they competed with the NRC's regulation of radiation hazards, "punitive damages may not be awarded in this case" (J.S.App. 24a). The court never addressed, analyzed or ruled on the validity of the punitive damages statute itself. In fact, nowhere in the Tenth Circuit's opinion is the statute even mentioned.[13]

[13] The dissenting opinion in the decision below suggests that the award of punitive damages in this case rested on common law rather than state statute: "The question here is whether the Atomic Energy Act . . . impliedly preempts part of the Oklahoma common law remedy" (J.S.App. 32a).

Jurisdiction under § 1254(2) may not be invoked merely by challenging the validity of an action taken under a statute; the statute itself must be specifically challenged and held to be invalid, and not merely inapplicable. In *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, ____ U.S. ____, 103 S.Ct. 948 (1983), the court of appeals had held that certain provisions of a collective-bargaining agreement, but not the state statute authorizing such agreements, were constitutionally invalid. This Court denied the appeal under § 1254(2) stating that:

> No state statute or other legislative action has been invalidated by the Court of Appeals. The Court of Appeals has held only that certain sections of the collective bargaining agreement entered into by the school district and PEA are constitutionally invalid; the Indiana statute authorizing such agreements is left untouched.

103 S.Ct. at 953. Similarly here, the court of appeals left the Oklahoma statute untouched. Only the judicial award of punitive damages was held to be erroneous, because that type of regulation was preempted by the Atomic Energy Act. There was not, and is not, any attack on the Oklahoma statute properly before this Court.

Cases interpreting the analogous jurisdictional statute, 28 U.S.C. § 1257(2), also recognize the necessity of showing that the validity of the statute was drawn into question and actually decided by the court.[14] *Charleston Fed. Savs. & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 187 (1945); *Kulko* v. *California Superior Court*, 436 U.S. 84 (1978).[15]

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[14] In Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 675-77 n.11 (1974), this Court noted "the history of the close relationship between" § 1254(2) and § 1257. Decisions under § 1257(2) may be looked to for guidance in interpreting § 1254(2). 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4037, at 36 (1978).

[15] In *Kulko*, this Court said: "Appellant did not argue below that [the state] statute was unconstitutional, but instead argued that the

(Footnote continued on next page.)

In the present case it was the *assessment* of punitive damages that was challenged, not the *validity* of the statute. As this Court has noted, "[t]he mere objection to an exercise of authority under a statute, whose validity is not attacked, cannot be made the basis" of an appeal. *Jett Bros. Distilling Co.* v. *City of Carrollton*, 252 U.S. 1, 6 (1920). For this reason, this Court has often held that an appeal will not be sustained where a tax assessment is challenged on constitutional grounds but not the validity of the tax statute.[16]

The formulation of the punitive damage issue and the explicit statement of the holding of the court below confirm that the Oklahoma statute was not held to be invalid. When the court of appeals first framed the issue of punitive damages, it did not cite or mention the Oklahoma statute, but spoke only of the punitive damage award: "Kerr-McGee makes several argu-

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(Footnote continued from preceding page.)

Due Process Clause of the Fourteenth Amendment precluded the exercise of *in personam* jurisdiction over him. The opinion below does not purport to determine the constitutionality of the California jurisdictional statute." 436 U.S. at 90 n.4. Similarly here, no contention was made that the Oklahoma statute is unconstitutional or otherwise invalid but rather that the provisions of the Atomic Energy Act precluded the district court from granting punitive damages.

[16] Under 28 U.S.C. § 1257(2) it has long been settled that it is not sufficient to attack a tax assessment levied under a state statute as being unconstitutional or to show that the state court has passed upon the validity of the tax. The court must consider and sustain the validity of the tax statute itself in order to invoke this Court's appellate jurisdiction. Jett Bros. Co. v. City of Carrollton, 252 U.S. 1 (1920); Miller v. Board of County Comm'rs., 290 U.S. 586 (1933); Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 650 (1942); Charleston Fed. Savs. & Loan Ass'n v. Alderson, 324 U.S. 182, 185-86 (1945); Wilson v. Cook, 327 U.S. 474, 480-82 (1946). *See also* Reeves v. Williamson, 317 U.S. 593 (1942) (appeal dismissed for want of jurisdiction under predecessor statute to 28 U.S.C. § 1254 (2)).

ments that the award of punitive damages is improper. We need consider only one, the claim of federal preemption" (J.S.App. 21a). In addition, the court clearly identified the narrow ground upon which it denied punitive damages:

> A *judicial award* of exemplary damages under state law as punishment for bad practices or to deter future practices involving exposure to radiation is no less intrusive than direct legislative acts of the state. *Thus we hold punitive damages may not be awarded in this case.*

J.S.App. 24a (emphasis added). Thus, the Tenth Circuit's holding pertains to the judicial award of punitive damages in this case, and does not draw into question or decide the validity of a statute authorizing such damages generally, or as applied to areas of the law within the state's authority to control.

Exercising appellate jurisdiction in this case would make virtually any action authorized by state law and held to be invalid by a federal court of appeals reviewable on appeal even though the underlying statute is not placed under attack. Construing § 1254(2) in such a broad way would invite appeals to the detriment of this Court's ability to respond to the many cases brought under discretionary review, and would defeat the purpose of the statute. *See,* Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925,* 35 Yale L.J. 1 (1925).

The appellant cites several cases in which jurisdiction was invoked under § 1254(2) where a state statute was held invalid *as applied* (Appellant's Br. 3).[17] Those cases are readily distinguishable. In each, a specifically identified statute is expressly held by the court of appeals to be invalid as applied. In each, the challenged statute is fully analyzed and is the focus of the court's holding. In direct contrast to the cases cited by the appellant, here the challenged statute is neither construed nor identified as being the subject of the court's holding. The court

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[17] Malone v. White Motor Corp., 435 U.S. 497 (1978); Dutton v. Evans, 400 U.S. 74 (1970); City of Detroit v. Murray Corp., 355 U.S. 489 (1958).

never analyzed the statute's validity or applicability to the unique facts of this case. This is particularly germane since the compensatory award for alleged personal injuries upon which the punitive damage claim was premised has itself been reversed on state grounds.[18]

As the Court stated in *Memphis Natural Gas* v. *Beeler*, 315 U.S. 649. 651 (1942), the Judicial Code was intended "to foreclose an appeal as of right whenever the prescribed conditions have not been *rigorously* fulfilled" (emphasis added). Here those conditions have not been fulfilled at all and the appeal should be dismissed.

Finally, the Court should not accept this case on certiorari under 28 U.S.C. § 2103. There is no conflict among the circuits on the preemptive effect of the Atomic Energy Act; indeed, they are unanimous in following *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143, *aff'd mem.*, 405 U.S. 1035 (1972).[19] Moreover, the appellant concedes that this is the "first case involving nuclear power in which punitive damages have been awarded by a jury" (J.S. 13), demonstrating that it is not a question that arises frequently. Surely the unique facts of this case would have only slight precedential value. Additionally, since the court of appeals held that compensatory damages are available for nuclear accidents, there is no fear that a legitimate claimant would be deprived of compensation for any injuries actually sustained.

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[18] Appellants also rely on California v. Grace Brethren Church, 102 S.Ct. 2498 (1982) to support jurisdiction even where the lower court has not expressly held a statute unconstitutional as applied (Appellant's Br. 4). However, the appeal there is based on 28 U.S.C. § 1252, which the Court distinguished from other jurisdictional statutes noting that it stood as "an unambiguous exception to the policy of minimizing the mandatory docket of this Court." *Id.* at 2506. Further, unlike this case, the invalidity of the statute was a necessary predicate to the court of appeals decision in that case.

[19] *See* Washington States Bldg. & Const. Trades Council v. Spellman, 684 F.2d 627 (9th Cir. 1982); Illinois v. General Elec. Co., 683 F.2d 206 (7th Cir. 1982).

II.

THE ATOMIC ENERGY ACT OF 1954, AS AMENDED, PREEMPTS IMPOSITION OF PUNITIVE DAMAGES IN THIS CASE

A. Congress Intended to Occupy Entirely the Field of Nuclear Safety

This Court recently decided a case which controls the disposition of this action. In *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, ____ U.S. ____, 103 S.Ct. 1713 (1983), Justice White, writing for the majority, set forth a comprehensive analysis of the preemptive scope of the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.*, and firmly established that the federal government's authority over radiation safety is absolute, completely displacing any authority of the states. The Court held that "the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states." 103 S.Ct. at 1726. The Court stated:

> from the passage of the Atomic Energy Act in 1954, through several revisions, and to the present day . . . the federal government maintains complete control of the safety and "nuclear" aspects of energy generation. . . .

Id. The Court also noted that "Congress . . . intended that the federal government regulate the radiological safety aspects involved . . . in the construction and operation of a nuclear plant." *Id.* at 1723.[20] The Court based its analysis on several

[20] The Court recognized the dichotomy between the *economic* concerns involved in the generation, sale and transmission of nuclear power, which Congress explicitly recognized as a state responsibility, and the *safety* concerns of nuclear power, which Congress intended to be exclusively within the federal province. Regulation of the possession and use of special nuclear materials, because it is safety regulation, is a subject as to which "no role was left for the states." 103 S.Ct. at 1724.

provisions of the Atomic Energy Act, including § 274(k), 42 U.S.C. § 2021(k), which authorizes state regulation "for purposes other than protection against radiation hazards."[21]

The Court's analysis of Congress' intent to assert exclusive federal control in the area of radiation hazards is consistent with previous pronouncements by this Court and with the holdings of every court of appeals that has considered the issue, beginning with the watershed *Northern States* case.[22] Indeed, the exclusive authority of the federal government in this area has never been seriously disputed. The Tenth Circuit, in its decision below, adhered to these principles in holding that the award of punitive damages intrudes upon the exclusive federal authority to regulate radiation hazards and is preempted.

There are several reasons why Congress decided to assume exclusive control of radiation hazards. First, Congress' dual

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[21] Congress' intent to occupy entirely the field of nuclear safety is manifested unambiguously in the language of the 1954 Act and subsequent amendments and in the related legislative history. *See* Northern States Power Co. v. Minnesota, 447 F.2d at 1147-54. For a detailed analysis of the legislative history of the Atomic Energy Act and amendments, see Murphy & LaPierre, *Nuclear Moratorium Legislation in the States and the Supremacy Clause*, 76 Colum. L. Rev. 392, 394-414 (1976).

[22] *See* Train v. Colorado Pub. Interest Research Group, 426 U.S. 1, 16 (1976) (court recognized the "absence of any room for a state role" in the regulation of radiation hazards); Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1149 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972) (court recognized "Congressional . . . intention that the states possess no authority to regulate radiation hazards"); Illinois v. Kerr-McGee Chemical Corp., 677 F.2d 571, 581 (7th Cir.), *cert. denied*, ____ U.S. ____, 103 S.Ct. 469 (1982) (court found "Congress intended . . . to preempt state regulation of radiological hazards"); Washington States Bldg. & Const. Trades Council v. Spellman, 684 F.2d 627 (9th Cir. 1982) (court stated that Congress had "not waived or delegated its authority" over radioactive waste disposal).

purpose of protecting the public safety while at the same time encouraging private sector participation in the development of nuclear energy requires a delicate balancing of interests which can only be accomplished by exclusive federal control. The balance is achieved through the pervasive federal regulatory scheme created by the Atomic Energy Act. *See Pacific Gas & Electric,* 103 S.Ct. at 1717.[23] The regulations promulgated pursuant to the Atomic Energy Act have been described as a "scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency." *Siegel* v. *AEC,* 400 F.2d 778, 783 (D.C. Cir. 1968). *See also, Northern States Power Co.* v. *Minnesota,* 447 F.2d at 1153.

Second, exceptional scientific and technical expertise is required to regulate the complexities of radiation hazards and plant operations.[24] Congress felt that the states lacked the

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[23] The balance between safety and progress was recognized by the AEC in its report to the Joint Committee on Atomic Energy in the hearings on the 1954 Act:

> The potentialities of atomic energy continue to be attended by problems of control which call for an unusual degree of Federal participation. Nevertheless, we are confident that the inescapable restrictions and safeguards which society must impose on the utilization of atomic energy can be made consistent with allowing freedom of initiative to power producers; that the special problems of atomic energy can, without risk to security or safety and without unfair advantage to any group be reconciled with the proper roles of industry and Government as conceived in this country.

Hearings on S.3323 and H.R. 8862 Before the Joint Comm. on Atomic Energy to Amend the Atomic Energy Act of 1946, 83d Cong., 2d Sess. 575 (1954) (testimony of Commissioner Murray).

[24] For example, the "Standards for Protection Against Radiation," 10 C.F.R. Part 20, adopted by the AEC in 1957, were the result of several decades of research on the biomedical effects of radiation conducted by the leading scientists in the field for the National Committee on Radiation Protection and the International Commission on Radiological Protection. *See* Taylor, *Standards For Protection Against Radiation,* 12 Atom. Energy L.J. 139 (1970); Frampton, *Radiation Exposure—The Need For A National Policy,* 10 Stan. L. Rev. 7 (1957).

technical expertise necessary to deal with these matters. Even when the 1959 Amendment to the Atomic Energy Act[25] was enacted giving certain authority to the states, the AEC indicated that "certain areas would be excluded [from state regulation] because the technical safety considerations are of such complexity that it is unlikely that any state would be prepared to deal with them. . . ." *Hearings Before the Joint Comm. on Atomic Energy on Federal-State Relationships*, 86th Cong., 1st Sess. 294 (1959). *See also, id.* at 291-92; S. Rep. No. 870, 86th Cong., 1st Sess. 8 (1959).[26]

Congress' total occupation of the nuclear safety field is evidenced by the comprehensive regulatory and licensing scheme administered by the NRC, successor to the AEC. Congress vested in the Commission the power to license special nuclear material, 42 U.S.C. § 2073, to establish regulations "to govern the possession and use of special nuclear material," 42 U.S.C. § 2201(b), and to govern the "design, location, and operation of facilities" which use such material, 42 U.S.C. § 2201(i)(3).

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[25] 42 U.S.C. § 2021.

[26] Though the 1959 Amendment provided some role for the states, Congress intended that state participation be carefully circumscribed. The turnover of authority to regulate nuclear materials can only occur when the Commission is satisfied that the state program is compatible with the federal program and is adequate to protect the public health and safety. 42 U.S.C. § 2021(d)(2). The state standards for protection against radiation hazards must be the same as federal standards. S. Rep. No. 870, 86th Cong., 1st Sess. 9, 11 (1959). The Commission has the power to terminate its agreement with a state if necessary to protect the public health and safety. 42 U.S.C. § 2021(j). Finally, the more hazardous aspects of nuclear power cannot even be turned over to the states. 42 U.S.C. §§ 2021(b)(4), 2021(c). Oklahoma has not entered an agreement with the NRC under 42 U.S.C. § 2021, but even if it had it would not be able to assert any regulatory authority here because Kerr-McGee was licensed to possess special nuclear material in a quantity sufficient to form a critical mass. 42 U.S.C. § 2021(b)(4).

Through its regulations and license conditions, the Commission is able to monitor and maintain strict control over its licensees, regulating every aspect of nuclear fuel processing, including Kerr-McGee's plant. As mentioned above, the Commission maintains standards for protection against radiation which sets forth permissible radiation exposure levels. 10 C.F.R. Part 20. In 10 C.F.R. Part 70 the Commission sets forth the terms and conditions upon which special nuclear material will be licensed. No license will be issued unless the Commission determines that the applicant has qualified personnel, equipment and procedures adequate to protect health and safety. 10 C.F.R. § 70.23. Other safety aspects which the Commission regulates include the radiation monitoring system of the plant, the physical security of the plant and nuclear materials, and protection against theft or sabotage of nuclear materials. 10 C.F.R. §§ 70.23, 70.24, 73.1. The Commission has detailed regulations covering material balance, inventory, and record keeping for special nuclear materials. 10 C.F.R. §§ 70.51, 70.53. The Commission also regulates the instructions which must be given to workers, including such topics as health protection problems associated with exposure to radiation, precautions to minimize exposure, and the functions of protective devices. 10 C.F.R. § 19.12. All the alleged conduct cited by the appellant (Appellant's Br. 12-16) purporting to support the award of punitive damages, in addition to being unrelated to Silkwood's exposure,[27] is already regulated by the Commission regulations.

Congress has also provided an array of enforcement mechanisms, some of which deal with willful conduct. The Act provides for investigation, injunctive relief, civil and criminal penalties, and suspension or revocation of a license for conduct

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[27] The plaintiff proffered no evidence whatever of the conduct that caused or permitted Silkwood's contamination (III J.A. 902; Tr. 3443).

in violation of the Act or regulations. 42 U.S.C. §§ 2271, 2280, 2282, 2272-73, 2236. Civil penalties can be assessed in amounts up to $100,000 per violation. If the violation is a continuing one, each day constitutes a separate violation. 42 U.S.C. § 2282.[28] Willful conduct can lead to a criminal conviction resulting in substantial fines and imprisonment. 42 U.S.C. §§ 2272-73. Where a violation is willful, the Commission may summarily revoke the violator's license without prior notice or opportunity to demonstrate compliance. 10 C.F.R. §§ 2.202, 70.61.[29]

In the face of such explicit evidence of congressional intent to assert a wide-ranging governance over the safety aspects of nuclear power, the appellant suggests that the 1954 Atomic Energy Act and the 1959 Amendment relate only to licensing and administrative regulation and their preemptive scope does not extend to regulation by way of punitive damages (Appel-

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[28] The NRC has frequently exercised its power to impose civil fines. In 1982 alone it imposed the following fines on reactor licensees: Boston Edison ($550,000); Carolina Power & Light ($40,000); Cincinnati Gas & Electric ($200,000); Consolidated Edison ($185,000); Consolidated Edison ($40,000); Consumers Power ($16,000); Dairyland Power ($25,000); Georgia Power ($50,000); Maine Yankee ($30,000); PSE&G ($40,000); TVA ($50,000); VEPCO ($50,000); Carolina Power & Light ($120,000); Commonwealth Edison ($100,000); Georgia Power ($20,000); Portland General Electric ($50,000); Southern California Edison ($60,000); Duke Power ($44,000); Illinois Power Co. ($90,000); Indiana & Michigan Electric ($52,000); PSE&G ($40,000); Vermont Yankee ($40,000). *See* Enforcement Actions: Significant Actions Resolved, U.S. Nuclear Regulatory Commission, NUREG-0940, Vol. 1, Nos. 1-4 (1982). Recently, the NRC proposed a fine of $850,000 against PSE&G. *See* Wall Street Journal, May 9, 1983, p. 18.

[29] Numerous sections of the regulations recognize that "[a]ny person who willfully violates any provision of the Act or any regulation or order issued thereunder may be guilty of a crime and, upon conviction, may be punished by fine or imprisonment or both." *See, e.g.*, 10 C.F.R. §§ 19.30, 20.601, 40.81, 70.71 (1983).

lant's Br. 23, 27, 29). This is an impermissibly narrow reading of the legislation and is contrary to this Court's holding in *Pacific Gas & Electric* that the Atomic Energy Act preempts *all* radiation safety matters except those expressly ceded to the states. To limit the preemptive scope of the Act and the 1959 Amendment only to administrative-type regulation, as the appellant suggests, would elevate form over substance and defeat Congress' intention to exercise total control over safety matters. The language of the statute and statements in the legislative history are broad and unconditional in their assertion of authority. Nowhere in the Act or legislative history does Congress indicate that federal control over safety matters should be limited to specified modes of regulation. The absence of any express reference to punitive damages cannot be construed as giving that mode of regulatory authority to the states. On the contrary, only those roles which Congress clearly intended to leave to the states are outside the scope of the preemption, and it has never indicated such an intent with respect to punitive damages.

B. Punitive Damages Fall Within the Occupied Field of Regulation of Nuclear Safety Concerns

When the federal government completely occupies a given field or an identifiable portion of it, "the test of preemption is whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.' " *Pacific Gas & Electric*, 103 S.Ct. at 1726.[30] In this case, punitive damages were awarded for the sole purpose of punishing an NRC licensee for the general operating conditions of its plant rather than for specific conduct causing injury to Silkwood (of which there was no proof). This type of regulation of plant operating conditions falls squarely within the field occupied by the federal government.

This Court set forth the dual purposes underlying an award of punitive damages in *Smith* v. *Wade*, ____ U.S. ____, 103 S.Ct. 1625 (1983): "punitive damages are awarded in the jury's discretion 'to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future.' " *Id.* at 1639.[31] Any suggestion that exemplary

[30] The appellant argues that Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976) requires a showing of irreconcilable conflict between the federal scheme and a state common law remedy before the latter is preempted (Appellant's Br. 22). Since the *Pacific Gas & Electric* case has already addressed the subject matter at issue in this case (regulation of radiation hazards) and found that Congress completely occupied the field, the *Nader* case, which involves a completely different statutory scheme (regulation of aviation), is not controlling.

[31] Although in *Smith* v. *Wade* this Court was divided on the question of the proper standard for an award of damages under § 1983, the majority and dissent agreed that punitive damages are awarded to punish and deter wrongful conduct.

damages have additional functions, such as compensation, is contradicted by this Court's explicit statement in *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 266 (1981): "[p]unitive damages, by definition are not intended to compensate the injured party."[32] Under Oklahoma law, a complaining party is allowed to recover exemplary damages not because his position is meritorious, but because society is benefited by deterring wrongful conduct. Thus, if a punitive award will neither punish nor have a deterrent effect, the award will be disallowed. *Nixon* v. *Oklahoma City*, 555 P.2d 1283, 1285 (Okla. 1976). Moreover, punitive damages cannot be awarded unless actual damages are awarded. *Davidson* v. *First Bank & Trust Co.*, 609 P.2d 1259 (Okla. 1976).

The very nature of punitive damages is regulatory. They are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). The power to award punitive damages elevates a jury, untrained in the complexities of nuclear technology, to a position where it can usurp the regulatory judgment of the NRC in determining what radiation exposure levels are permissible and what safety measures must be taken. Further, the punishment and deterrent purposes of punitive damages serve a regulatory function in that they directly affect the standard of care exercised by a defendant. The impact of a punitive damages award is no less substantial than a statute enacted by a state legislature or a regulation

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[32] The fundamental distinction between punitive damages and compensatory damages was articulated by Justice Brennan in Smith v. Wade, 103 S.Ct. at 1638:

> punitive damages . . . are never awarded as of right, no matter how egregious the defendant's conduct. . . . Compensatory damages, by contrast, are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss.

promulgated by a state administrative agency.[33] Indeed, regulation by an award of punitive damages is more powerful than a statute or formal administrative regulation because the amount of the award is often arbitrary and generally uncontrollable, *IBEW* v. *Foust*, 442 U.S. 42, 50-51 n.14 (1979), and the regulatory standard is vague, amorphous, and pronounced after the fact. The conclusion that exemplary damages are regulatory in nature is so compelling that the appellant has abandoned its earlier argument and admits that "regulation can be as effectively asserted through an award of damages as through some form of preventive relief." Appellant's Br. 43, *quoting, San Diego Unions* v. *Garmon*, 359 U.S. 236, 247 (1959).

Punishment and deterrence of nuclear licensees are not powers that Congress has expressly ceded to the states. There is no indication, express or implied, that Congress ever intended these functions to be controlled by the states. Therefore, the state effort to punish and deter conduct related to radiation hazards, as exercised in the form of punitive damage awards, is preempted by federal occupation of the field.

The appellant attempts to circumvent a finding of preemption by arguing that punitive damages were awarded in this case merely to regulate Kerr-McGee's "state of mind" (Appellant's Br. 44-48). Thus, according to the appellant, the regulation effected by the award was for "purposes other than protection against radiation hazards." 42 U.S.C. 2021(k). This sophistic argument ignores the fact that the supposed "outrageous conduct" in this case involves the allegedly unsafe

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[33] Thus, the Tenth Circuit properly relied on Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972) in finding preemption of punitive damages. Prohibiting the emission of radioactive effluents by administrative regulation, as occurred in *Northern States*, is no different than permitting a private plaintiff to recover punitive damages against an NRC licensee who has emitted such effluents to punish the licensee and deter him from doing it again.

manner in which Kerr-McGee conducted its operations at its plutonium processing facility. The district court noted that "punitive damages in this case were awarded for conduct that caused or permitted the escape of plutonium and led to the contamination of Silkwood in her apartment" (J.S.App. 72a). Thus, in imposing punitive damages in this case, the jury was not merely punishing a state of mind, they were prescribing the manner in which Kerr-McGee must conduct the operations in its plutonium plant. This Court stated in *Pacific Gas & Electric* that state regulation of the *operation of a nuclear power plant* is impermissible because "such regulation, even if enacted out of non-safety concerns, would nevertheless directly conflict with the NRC's exclusive authority over plant construction and operation." 103 S.Ct. at 1726.

Although the purposes underlying the award of punitive damages in matters of state concern may serve a societal interest, the appellant's characterization of such damages as a "state tort right" that is "deeply rooted in local feeling and responsibility" (Appellant's Br. 46) exaggerates the historical importance of punitive damages as well as a state court's role in awarding them. Because punitive damages are not a part of the compensatory scheme and are actually windfalls to a successful plaintiff, they have been the subject of vigorous criticism for many years.[34] In his dissent in *Smith v. Wade,* Justice

[34] Many courts have noted that punitive damages are not a "favorite in the law." *See, e.g.,* Linscott v. Rainier Nat. Life Ins. Co., 606 P.2d 958 (Idaho 1980); Town of Jackson v. Shaw, 569 P.2d 1246 (Wyo. 1977); Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1978). Moreover, the doctrine of exemplary damages has been subjected to a variety of constitutional attacks including violation of due process, equal protection and the prohibition against double jeopardy. *See* Ghiardi & Kircher, *Punitive Damages* §§3.01-07 (1983); Wheeler, *The Constitutional Case for Reforming Punitive Damage Procedures,* 69 Va. L. Rev. 269 (1983).

Rehnquist summarized this Court's prior holdings concerning punitive damages:

> [P]unitive damages are frequently based upon the caprice and prejudice of jurors. (Citation omitted). We observed in *Electrical Workers v. Foust*, 442 U.S. 42, 50-51 n.14 (1979), that "punitive damages may be employed to punish unpopular defendants," and noted elsewhere that "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the harm caused." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Finally, the alleged deterrence achieved by punitive damage awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined.

103 S.Ct. 1641-42. Justice Rehnquist also noted that "a significant number of American jurisdictions refuse to condone punitive damage awards." *Id.* at 1642.

The appellant's statement that punitive damages serve an interest which "belongs peculiarly to the states" (Appellant's Br. 44) finds no support in legal experience or in the circumstances of this case. The functions of punishment and deterrence are hardly within the exclusive province of a state court. For example, this Court has held that an award of punitive damages is available in a federal action brought under 42 U.S.C. § 1983. *Smith* v. *Wade*, 103 S.Ct. 1625. Moreover, punishment in the form of civil and criminal penalties is commonly levied by federal regulatory agencies, including the Nuclear Regulatory Commission (*see* footnote 28, *supra*). When a deterrent mechanism is already provided by a regulatory agency, a state has no compelling reason to provide a private plaintiff a forum in which to receive punitive damages.

The imposition of a punitive sanction upon a nuclear licensee, in particular, is a matter of federal rather than local control. The nuclear industry is a field in which the government at one time held a monopoly and in which it has continued to maintain a controlling position. Because the hazards of nuclear

materials must be carefully balanced with the nation's energy and defense needs, the interest of the federal government in exercising complete control over the operations of licensed facilities overshadows any local interest in accomplishing an objective that may be performed by the NRC.[35]

The appellant argues that if punitive damage awards are preempted, compensatory damage awards must also be preempted since all damage awards regulate a defendant's standard of conduct (Appellant's Br. 43). Since the Tenth Circuit affirmed the property damage award, the appellant contends that there exists a basic inconsistency in the Tenth Circuit's analysis. This argument overlooks the fact that certain powers have been ceded to the states either through specific legislative enactments or through congressional intent as evidenced by the legislative history of the Atomic Energy Act and its amendments. For example, Congress has specifically authorized the states to regulate radioactive air pollutants from nuclear plants in the Clean Air Act Amendments of 1977, 42 U.S.C. § 7422, and to impose certain siting and land use requirements for nuclear plants in the NRC Authorization Act for Fiscal Year 1980, Pub. L. 96-295, 94 Stat. 780 (1980). Another area specifically ceded to the states is the compensation of tort victims of a nuclear incident that does not rise to the level of an

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[35] The labor law cases cited by the appellant do not concern conduct which the federal government has an overriding interest in controlling. *See, e.g.*, Farmer v. Carpenters, 430 U.S. 290 (1977) (plaintiff complained of public ridicule, verbal abuse, and other methods of harassment); United Automobile Workers v. Russell, 356 U.S. 634 (1958) (plaintiff threatened with bodily harm and generally intimidated); United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1954) (plaintiff threatened and intimidated). Moreover, those cases involve an entirely different regulatory scheme than the one under analysis in this case. As the Court stated in City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638 (1973): "Our prior cases on preemption are not precise guidelines in the present controversy, for each case turns on the particularities and special features of the federal regulatory scheme in question."

extraordinary nuclear occurrence. This delegation is made clear in the legislative history of the Price-Anderson Act, 42 U.S.C. § 2210. *See* discussion p. 34-39, *infra*. Thus, the appellant's claim that the Tenth Circuit was inconsistent in finding no preemption of compensatory damages while holding punitive damages preempted has no merit. Even if compensatory damages do have some regulatory effect on radiation safety concerns, they fall in an area specifically delegated to the states.

The appellant has advanced no new argument which would prevent this Court from adhering to the preemption analysis set forth in *Pacific Gas & Electric*.[36] Because punitive damages serve a regulatory function that falls within a field occupied by the federal government, such awards are preempted.

C. Punitive Damages Are Preempted Because They Are an Obstacle to the Accomplishment of the Purposes of the Federal Nuclear Regulatory Scheme

In addition to being preempted when Congress has occupied the field, state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

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[36] The appellant's suggestion that an NRC licensee could intentionally injure someone and be immune from punishment is untrue as well as inapplicable here. There is no evidence that Kerr-McGee intentionally caused the plutonium to be in Silkwood's apartment. In refusing to give an instruction on intentional contamination, the trial judge stated: "I don't think there's any evidence to sustain that . . ." (Tr. 9984). The Tenth Circuit agreed (J.S. App. 8a). In any event, there could never be an "intentional contamination" which would not constitute a flagrant and manifold violation of NRC regulations and the operator's license conditions, as well as the criminal laws. *See, e.g.*, 10 C.F.R. §§ 70.3, 70.71.

1. Punitive Damages Frustrate Congress' Intent to Promote and Develop Nuclear Energy

The purposes and objectives of Congress concerning the nuclear energy industry are expressed in the Atomic Energy Act which sets forth a program "to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes." 42 U.S.C. § 2013(b). The promotion of nuclear power continues to be a primary purpose of the Act today. Indeed, in *Pacific Gas & Electric,* this Court dismissed the argument that legislation enacted in recent years indicates a congressional intent to abandon the objective of promoting nuclear power:

> [A] suggestion that legislation since 1974 has indicated a "change in Congressional outlook" is unconvincing. . . . The continuing commitment to nuclear power is reflected in the extension of the Price-Anderson Act's coverage until 1987, Pub. L. No. 94-197, § 2-14, 89 Stat. 1111-1115, as well as in Congress' express preclusion of reliance on natural gas and petroleum as primary energy sources in new power plants.

103 S.Ct. at 1731.[37]

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[37] In the Nuclear Safety Research, Development and Demonstration Act of 1980, 42 U.S.C. §§ 9701-08, Congress expressly accepted the importance of nuclear power in its finding that "nuclear energy is one of the two major energy sources available for electric energy production in the United States during the balance of the twentieth Century." 42 U.S.C. § 9701(a)(1). Both the Act and its legislative history reaffirm Congress' commitment to promote nuclear power. The Act establishes a detailed system of studies and research programs to assure the continued safety and viability of nuclear energy. Congress would not enact such a comprehensive research and development program if nuclear power were not to be promoted as a significant energy resource.

The availability of punitive damages would conflict with Congress' continuing desire to promote and develop nuclear energy. Because exposure to unlimited exemplary liability would necessarily inhibit participation in the nuclear industry, the development of nuclear power would be impeded. This is particularly true here where there is no evidence of conduct by Kerr-McGee causing the personal injury, but only general allegations of unsafe plant operations. This conclusion is supported by this Court's holding in *IBEW* v. *Foust*, 442 U.S. at 52, that punitive damages may not be awarded against unions for breach of the duty of fair representation because the arbitrary nature of such damages creates a "chilling effect" which would impair the effectiveness of unions. *See also, Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) (punitive damages are precluded where they might impair First Amendment rights).

The arbitrary and capricious nature of exemplary damages distinguishes such awards from fines levied pursuant to the civil penalties provisions of the NRC regulations. While the penalties imposed by the NRC may be severe, they are not subject to the whims of a jury and thus do not create the same "chilling effect." To achieve and maintain active participation in the nuclear energy industry, it is imperative that licensees not be subjected to after-the-fact standards that are nothing more than a "moving target."

The conflict created by an award of punitive damages is magnified when a licensee is subjected to extreme awards even though it is in compliance with the federal regulatory scheme. One need not speculate as to the potential for mischief; in this case, the AEC found that Kerr-McGee was in compliance with AEC regulations as they related to Silkwood's alleged injury and property damage (Def. Exh. 37, II J.A. 729-790, Tr. 6154), yet a civil jury apparently concluded that those regulations did not impose a high enough standard. Such second-guessing by a jury clearly frustrates the objectives which the Commission sought to accomplish in creating and administering its regulations.

2. Punitive Damages Conflict With Congress' Express Intent to Preclude Dual Regulation of Radiation Hazards

Congress has recognized the need for expertise and uniformity in the regulation of radiological hazards. In 1959, Congress amended the Atomic Energy Act of 1954 to add Section 274, 42 U.S.C. § 2021, which recognized and defined the role of the states in connection with nuclear energy regulation. The Senate Report accompanying the amendment states that "[section 274] is not intended to leave any room for the exercise of dual or concurrent jurisdiction by States to control radiation hazards. . . . The intent is to have the material regulated and licensed either by the Commission, or by the State and local governments, but not by both." S. Rep. No. 870, 86th Cong., 1st Sess. 9 (1959). AEC Chairman Graham testified that after carefully examining the entire problem of federal-state relations, "we have decided that it would be undesirable to provide for the exercise of dual or concurrent jurisdiction." *Hearings Before the Joint Comm. on Atomic Energy on Federal-State Relationships*, 86th Cong., 1st Sess. 290 (1959). Mr. Lowenstein, Office of the General Counsel, AEC, explained that concurrent jurisdiction would be a waste of manpower and funds, and that it would lead to divided responsibilities and bad safety controls. *Id.* at 315.

After recognizing the undesirability of concurrent state and federal regulation of radiation hazards, Congress determined which regulatory functions could be delegated to the states. Congress' refusal to delegate the functions of punishment and deterrence indicates its desire and intent that those responsibilities be maintained exclusively by the federal government. If a state were allowed to perform those functions simultaneously, Congress' intent to preclude concurrent regulation would be frustrated.

Moreover, Congress' intent to achieve uniformity of regulation would be obstructed. When the state and federal governments attempt to perform identical regulatory functions, the potential for conflict is obvious. This Court in *San Diego Unions* v. *Garmon*, 359 U.S. 236 (1959) stated:

> Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.

Id. at 244. Here, the trial court's instructions invited the jury to award punitive damages irrespective of Kerr-McGee's compliance with AEC regulations.[38] If uniformity is to be maintained and conflict avoided, the establishment of operational standards for NRC licensees cannot be placed in the hands of judges and jurors. The NRC must be the sole regulator in this area. Only through the application and enforcement of uniform health and safety standards promulgated by a national agency will the objectives of Congress be realized. *Northern States Power Co.* v. *Minnesota*, 447 F.2d at 1153-54.

D. The Price-Anderson Act Does Not Sanction State Imposition of Punitive Damages

The Price-Anderson Act, 42 U.S.C. § 2210, was enacted in 1957 as an amendment to the Atomic Energy Act of 1954. Because of the risk of extensive liability in the event of an accident, private industry had been reluctant to enter the nuclear energy field. The Price-Anderson Act was intended to reduce this hesitancy by putting a ceiling on the liability of

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[38] *See* Instructions 10, 12, and 27 (J.S.App. 101a, 103a, 118a). Instruction 12 states that a finding of compliance "would not necessarily preclude a finding of blameworthy conduct" meriting an award of punitive damages (J.S.App. 103a).

nuclear licensees and by providing government indemnification for additional amounts of liability. In 1965 the Act, which was to expire in 1967, was extended for another ten year period. Pub. L. 89-210, 79 Stat. 855 (1965). In 1966 Congress amended the Act to set up a "waiver of defenses" system whereby nuclear licensees waive certain traditional defenses in situations involving a major nuclear catastrophe. 42 U.S.C. § 2210(n). This system eliminated the vagaries of different state laws on the issues of strict liability and the statute of limitations without the necessity of enacting a substantive federal tort law. In 1975 the Act was again extended for another ten years. Pub. L. 94-197, 89 Stat. 1111 (1975).

The appellant places heavy reliance on the Price-Anderson Act in an attempt to fashion a congressional intent to sanction state awards of punitive damages against federal licensees in suits involving radiation hazards. The appellant cites numerous references in the legislative history indicating a congressional intent that the provisions of Price-Anderson would cause only "minimal interference" with state tort law (Appellant's Br. 30-35). However, to strain these references to authorize or approve punitive damages would distort the purpose of the Act and conflict with Congress' manifest intent to keep safety regulation in the federal realm. Consequently, the references to state tort law must be read as referring to state tort law for purposes of compensation only.[39]

The references to state tort law also must be read in the full context of the Price-Anderson Act. The thrust of the original Act in 1957 and the "waiver of defenses" amendments in 1966 was to compensate the public, not punish nuclear licensees. The "clear intent" of Congress was to assure "that the public would receive prompt and adequate financial compensation" for any damage resulting from potential nuclear incidents. S.

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[39] *See* Comment, *Implied Preemption of Punitive Damages for Nuclear Accidents*, 29 Am. U. L. Rev. 741, 765-68 (1980).

Rep. No. 650, 89th Cong., 1st Sess. 5 (1965).[40] At the same time, Congress wanted to moderate the deterrents to private industrial participation in the nuclear industry. S. Rep. No. 296, 85th Cong., 1st Sess. 1 (1957). In all its consideration of the Price-Anderson Act and its amendments, Congress made no indication, express or implied, that it intended to authorize or approve punitive damages.

Clearly, the intent of Price-Anderson was not to grant the general public or the states means to punish or regulate the conduct of nuclear operators.[41] Rather, Congress' sole intent was to provide compensation to those injured from radiation accidents. This intent was carried out in several ways. In the 1957 Act, insurance (or "financial protection") requirements were imposed on licensees. 42 U.S.C. § 2210(a). Indemnity by the government was provided for incidents involving damages in excess of available insurance coverage. 42 U.S.C. § 2210(c). In the 1966 Amendment concerning waiver of defenses, Congress acted to remove any uncertainty about the compensation

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[40] There are numerous other references in the legislative history to the compensatory purpose of the Act. *See, e.g., Hearings Before the Joint Comm. on Atomic Energy on Government Indemnity,* 85th Cong., 1st Sess. 9 (1957) (the bill eliminates possible gaps in the availability of *compensation* to the public); *id.* at 169 (the government must assure the public that it will be *compensated* for losses); S. Rep. No. 454, 94th Cong., 1st Sess. 14-17 (1975) (references to *compensation* of claimants); S. Rep. No. 1605, 89th Cong., 2d Sess. 9-10 (1966) (concern that inability to prove negligence may cause victims to go without *compensation*). *See also* Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 93 (1978) (Price-Anderson is a mechanism for *compensating* victims).

[41] In fact, a statement in S. Rep. No. 296, 85th Cong., 1st Sess. (1957), indicates that willful misconduct should be dealt with through administrative action. In noting that losses resulting from willful misconduct would be covered by the insurance and indemnity provided by the Act, the Report adds: "However, the circumstances surrounding any nuclear incident, including the willfulness, would certainly be grounds for examining and possibly suspending the operations under the license." *Id.* at 18.

of legitimate victims of a major nuclear accident by removing the potential legal obstacles of negligence and contributory negligence from any suit. Because of the uncertainty of whether strict liability would be available, Congress feared that legitimate claims might be left uncompensated. S. Rep. No. 1605, 89th Cong., 2d Sess. 3-4 (1966). To prevent this, a no-fault compensation system was created for extraordinary nuclear occurrences.

These were the principal concerns of Congress and the legislative history must be read in that light. Congress was concerned with providing compensatory financial protection and assuring no-fault recovery without changing the substantive laws of the states. This intent should not be transformed into a congressional authorization of state intrusion into the exclusive federal field of punishing licensees and regulating the way in which they conduct the safety operations of their plant.

Further, punitive damage awards would defeat the main purposes of Price-Anderson. The two basic goals of the Act are to assure the availability of funds to compensate victims of nuclear accidents and to encourage private industrial participation in the nuclear energy field. 42 U.S.C. § 2012(i); S. Rep. No. 650, 89th Cong., 1st Sess. 4 (1965). In the event of a major nuclear accident, windfall punitive awards to some claimants could reduce the insurance and indemnity fund available to compensate other victims. Moreover, the appellant's construction would have the government creating an elaborate system of insurance and compensation, in large measure to secure future nuclear industry development, only to chill that participation by permitting capricious punitive awards. Finally, punitive awards would result in the anomalous situation that the federal government, through the indemnity funds it provides, might itself be paying punitive damages to a plaintiff (even though the financial protection of that person had already been accomplished by a compensatory damage award).

The appellant's argument that Congress considered and rejected a proposed amendment expressly forbidding punitive damages (Appellant's Br. 19, 36-37) is contrived. The appellant's treatment of the views of Professor Cavers is misleading in that it inflates a single paragraph of a law review article into a "proposed ... amendment" to the Price-Anderson Act (Appellant's Br. 37). The appellant's implication is that the Joint Committee on Atomic Energy (JCAE) and even Congress as a whole gave this single paragraph of the article (which was buried among the 41 appendices to the 1965 Hearings) detailed consideration and made a reasoned rejection of the "proposal." In Professor Cavers' testimony (which was given in 1965, before the Committee was even considering the waiver of defenses amendment) punitive damages are never even mentioned.[42] The bill actually submitted to the JCAE in 1966 and eventually enacted by Congress was silent on the issue of punitive damages. H.R. 15913, 89th Cong., 2d Sess. (1966).

Equally meritless is the appellant's claim that the AEC has implemented the 1966 Amendments in a manner which shows that punitive damages are not preempted (Appellant's Br. 38-39). The appellant cites language from a nuclear energy liability insurance form which states that the waiver of defenses does not apply to a claim for punitive damages. 10 C.F.R. § 140.91, Appendix A. The cited language does not constitute a recognition by the NRC that punitive damages are not preempted, but rather highlights the compensatory nature of the Price-Anderson scheme. The AEC's explanation for making the waivers inapplicable to punitive damage claims was that "the intent of the legislation is to assure *compensation* for injury...." 33 Fed. Reg. 6982 (1968) (emphasis added). Thus, the

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[42] *Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy on Proposed Extension of AEC Indemnity Legislation*, 89th Cong., 1st Sess. 211-223 (1965).

language in the insurance form shows no more than the fact that the Commission did not want to foster or facilitate claims for punitive damages in cases of extraordinary nuclear occurrences and made the waivers inapplicable to such claims.[43] Further, the language in the insurance form does not address the question of preemption and cannot be taken as an official interpretation by the Commission on that question. On the contrary, the only official interpretation the Commission has issued on preemption emphasizes the broad scope of preemption under the Act. *See,* 10 C.F.R. § 8.4(i) (Congress intended to preempt the "total responsibility and authority" over radiation hazards).

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[43] The insurance form referred to by appellant is not a required form but is merely one which would be acceptable to the Commission. *See* 10 C.F.R. § 140.15(a)(3). For this reason, the NRC recently issued a proposed rule to remove this form insurance policy from the Code of Federal Regulations. 48 Fed. Reg. 9284-85 (1983).

The court below fully accommodated the interest of compensating victims of nuclear accidents by recognizing that in Oklahoma the law of strict liability is available in such situations. In holding that punitive damages are preempted in this case, it also accommodated the interest of preserving exclusive federal control over the safety aspects of nuclear power.[44]

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[44] The appellant has argued, in a cursory fashion, that the Tenth Circuit's decision violates the due process and equal protection guarantees of the Constitution because it precludes the submission of a punitive damages claim to a jury and fails to provide a substitute remedy for punitive damages (Appellant's Br. 49 n.48). These contentions are without merit.

Under the circumstances presented in this case, the principles of due process and equal protection require no more than that Congress' decision to preclude punitive damages not be "demonstrably arbitrary or irrational." Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 84 (1978). Here, the legislative determination to preclude awards of punitive damages is neither arbitrary nor irrational; rather, it is logically related to the goals of implementing a uniform federal regulatory scheme for radiation hazards and encouraging private participation in the nuclear industry.

Indeed, the Court in *Duke Power* specifically noted that "in general, limiting liability is an acceptable method for Congress to utilize in encouraging the private development of electric energy by atomic power . . ." 438 U.S. at 86. The Ninth Circuit in *In Re* Paris Air Crash, 622 F.2d 1315 (9th Cir.), *cert. denied*, 449 U.S. 976 (1980), applied *Duke Power* in considering the constitutionality of a state's disallowance of punitive damages under a punitive damage statute in wrongful death suits. Finding the wrongful death statute limiting tort liability to be rational, the court rejected the equal protection challenge. 622 F.2d at 1320-21. *See also* Johnson v. International Harvester Co., 487 F. Supp. 1176 (D.N.D. 1980).

The Tenth Circuit's decision is not unconstitutional for failure to provide a substitute for punitive damages. This Court stated in Duke Power, 438 U.S. at 88, "it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy." This question was not decided, however, because the Court concluded that the Price-Anderson Act provided a reasonably just substitute. Similarly, there *is* a *quid pro quo* in this case. Extensive regulation by a federal agency for the protection of the public has been established, including the formation of an agency with authority to impose heavy penalties and fines and to revoke licenses. *See* discussion pp. 21-22, *supra*.

III.

THE FINAL, NON-REVIEWABLE HOLDING BY THE TENTH CIRCUIT THAT THE DISTRICT COURT HAD NO JURISDICTION TO HEAR APPELLANT'S PERSONAL INJURY CLAIM ELIMINATES THE BASIS FOR THE PUNITIVE DAMAGE AWARD

In stating the case, the appellant has wholly ignored the plain fact that the punitive damages were awarded here based on claims of personal injury to Silkwood. The court of appeals' non-reviewable[45] ruling that the personal injury claim is precluded by the Workers' Compensation Law nullifies the $10,000,000 punitive damage award since that award was incident to the personal injury claim. This is true without regard to federal preemption.

The appellant has attempted to invoke this Court's mandatory appellate jurisdiction under 28 U.S.C. § 1254(2), which restricts review to the federal questions presented. Accordingly, the appellant's Jurisdictional Statement is confined to challenging the Tenth Circuit's reversal of the award for punitive damages on federal preemption grounds; it does not and cannot seek review of the Tenth Circuit's holding that the trial court lacked jurisdiction over the personal injury claim because of the exclusive remedy provided by Oklahoma's Workers' Compensation Act.[46] Even were this Court to grant certiorari under

[45] This Court will not review on appeal under 28 U.S.C. § 1254(2), a lower court's interpretation of state law. City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 292 (1982).

[46] The appellant intimates (Appellant's Br. 8 n.13) his intention to further challenge the applicability of the Workers' Compensation Act in the district court, and refers to his Jurisdictional Statement at page 6 n.5, where he alludes to the Tenth Circuit's remand "for further considerations consistent herewith" as justification for raising the "claim of intentional or willful injury in this case." There is no basis for any such challenge. First, neither court below left the

(Footnote continued on next page.)

28 U.S.C. § 2103, the Tenth Circuit's holding that the trial court lacked jurisdiction over Silkwood's personal injury claim would not be subject to review.[47]

Since the trial court had no jurisdiction over the personal injury claim, any award of punitive damages predicated upon that claim cannot stand.[48] The liability prescribed by the

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(Footnote continued from preceding page.)

appellant such latitude. The district court stated that there was no evidence of intentional injury by Kerr-McGee (Tr. 9984, 9989); the Tenth Circuit agreed and specifically held that because there was a lack of evidence of intentional contamination by Kerr-McGee the evidence "required the Court to grant judgment n.o.v. holding that workers' compensation was the exclusive remedy for personal injuries suffered by Silkwood" (J.S.App. 9a). Second, the appellant can make no pretense of having withheld evidence relevant to intentional contamination, since any such evidence would also have been relevant to establish Kerr-McGee's purported malice—necessary to an award of punitive damages. Finally, the applicability of the Workers' Compensation Act was vigorously asserted at every stage of this action.

[47] Only the questions set forth in the jurisdictional statement will be considered by the Court. Sup.Ct.R. 15.1(a), 34.1(a). There are limited exceptions which the Court has made, none of which is applicable here, such as the "plain error" rule usually invoked only in criminal cases. Silber v. United States, 370 U.S. 717, 718 (1962).

[48] In Oklahoma, exemplary damages cannot constitute an independent basis for a cause of action, and are recoverable only as an incident to the recovery of compensatory damages. Barnes v. McKinney, 589 P.2d 698, 700 n.1 (Okla. Ct. App. 1978). Without a claim for actual damages, a claim for punitive damages no longer exists. Davidson v. First Bank and Trust Co., 609 P.2d 1259, 1262 (Okla. 1976); Fuller v. Neundorf, 278 P.2d 836, 839 (Okla. 1954).

Oklahoma Workers' Compensation Act is "exclusive and in place of all other liability of the employer and any of his employees, at common law or otherwise, . . ."[49] and does not include any provision for punitive damages.[50] The Oklahoma Act is characteristic of workers' compensation laws throughout the country. A respected commentator on these laws has discussed the non-availability of punitive damages where workers' compensation applies. 2A Larson, *The Law of Workman's Compensation* § 65.37 (1982) states:

> Although punitive damages are of course not recoverable under a workers' compensation act, it does not follow that a suit for punitive damages escapes the exclusiveness bar. On the contrary, at any point where compensatory damages would be barred, punitive damages are also barred.

There is no deviation in reported case law from the rule as stated by Professor Larson.[51]

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[49] Okla. Stat. Ann. tit. 85, § 12 (West Supp. 1982). The cases have consistently implemented this clear directive. *E.g.*, Carroll v. Dist. Court of Cherokee County, 579 P.2d 828 (Okla. 1978). The exclusivity provision represents a "trade-off," whereby an employee "relinquishes his/her right to sue for damages sustained in job-related injuries" in exchange for the protections accorded under the Act. Weber v. Armco, Inc., 54 Okla. B.J. 1267, 1268 (Okla. 1983).

[50] Okla.Stat.Ann. tit. 85, § 12, reproduced at p. 62 of App. to Kerr-McGee's Motion to Dismiss or Affirm.

[51] Cases in which it was held that the exclusivity provisions in workers' compensation laws preclude an award of punitive damages include: North v. United States Steel Corp., 495 F.2d 810, 814 (7th Cir. 1974); Dickson v. Mountain State Mut. Cas. Co., 650 P.2d 1, 3 (N.M. 1982); Liberty Mut. Ins. Co. v. Stevenson, 368 S.W.2d 760, 762 (Tenn. 1963); and Ellis v. Rocky Mountain Empire Sports, Inc., 602 P.2d 895, 898 (Colo. Ct. App. 1979).

The Tenth Circuit has held that the exclusivity provision of the Oklahoma Workers' Compensation Act precludes recovery of compensatory and punitive damages for injuries covered by the Act, even though plaintiff alleges "the highest possible degree of negligence." Arrington v. Michigan-Wisconsin Pipeline Co., 632 F.2d 867, 871 (10th Cir. 1980).

The appellant's statement of facts (Appellant's Br. 8-14) details Silkwood's contamination and emphasizes that which is no longer involved in this case—the *personal* contamination of Karen Silkwood. Indeed, the loss of Silkwood's personal property—stipulated to be worth $5,000—is mentioned by the appellant only in passing, as it was at trial. Thus, ignoring the Tenth Circuit's holding that the trial court had no jurisdiction over the personal injury claim, the appellant continues to urge assessment of the purported culpability of Kerr-McGee in the context of the gravity of harm to Silkwood personally—not to her property.

There can be no doubt that the jury awarded punitive damages as incident to the personal injury claim. The trial court's instruction on punitive damages shows the basis of the punitive award to be personal injury (Instruction No. 19, J.S.App. 112a-113a). Further, the trial court refused to set aside the punitive damage award as excessive on the express ground that the court believed the award bore some relationship to *personal injury,* and made no mention of property damage (J.S. App. 83a-85a).

As to the property damage award, the jury was directed to return its verdict for the appellant on the basis of *liability without fault.*[52] This was acknowledged by the Tenth Circuit, which affirmed that award not on the basis of negligence or on the basis of evidence of any intentional act or omission of Kerr-McGee, but simply because the source of the plutonium which contaminated Silkwood's personal property was stipulated to be the Kerr-McGee plant and the damage which occurred was foreseeable (J.S.App. 20a-21a).

Oklahoma law requires a causal relationship as a nexus between the injury to be compensated and any punitive dam-

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[52] *See* Instruction No. 18 and No. 20 (J.S.App. 109a-111a; 113a-116a).

ages which may be awarded. In *Hobbs* v. *Watkins*, 481 P.2d 746, 747-48, 753-54 (Okla. 1971), the court, while recognizing that the amount of an award of exemplary damages is not necessarily governed by the amount awarded as compensatory damages, states the rule that "[e]xemplary damages must bear some relation *to the cause* and extent of one's injuries. . . ." *Id.* at 747-48 (emphasis added). Since the property damage award was made and sustained on the basis of liability without fault and since the plaintiff conceded it could not show how the plutonium got into Silkwood's apartment, the property damages here were not and could not be the predicate for any punitive damage award in this case. The personal injury claim—the only basis upon which the award for punitive damages could have been made—has been entirely removed by the Tenth Circuit's non-reviewable holding that the workers' compensation statute barred the personal injury claim. Thus, without any proper predicate for punitive damages the award cannot stand. On this ground alone the judgment below should be affirmed.[53]

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[53] Other grounds for the reversal of the trial court's punitive damage judgment were urged on appeal to the Tenth Circuit by Kerr-McGee, but were never considered because of the disposition below. Among these are:

(1) Kerr-McGee's substantial compliance with AEC regulations negates any finding of malice required for punitive damages;
(2) there is no evidence of malice by Kerr-McGee;
(3) the trial court erred in certain of its instructions concerning punitive damages;
(4) the misconduct of counsel and prejudicial publicity prevented a fair trial; and
(5) the punitive damage verdict was excessive.

These grounds were extensively briefed below and relied on a detailed review of the record in their analysis. In the event that the present case is not dismissed or affirmed, this cause should be remanded to that court for consideration of these other grounds.

CONCLUSION

For all of the foregoing reasons, this appeal should be dismissed or, in the alternative, the judgment below should be affirmed.

Respectfully submitted,

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No. 81-2159

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BILL M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, Deceased,
Appellant,

v.

KERR-MCGEE CORPORATION, a Delaware corporation, and KERR-MCGEE NUCLEAR CORPORATION, a Delaware corporation,
Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR APPELLANT

JURISDICTION

Appellees (hereinafter "KM") and the Solicitor General dispute this Court's jurisdiction under 28 U.S.C. § 1254(2), because the court below did not expressly mention Oklahoma's punitive damage statute in its opinion. KM Br. 12; US Br. 2.[1] This argument is specious. Punitive damages exist in Oklahoma *only* pursuant to the state statute, and that statute unquestionably authorized punitive damages here.[2] The district court recognized that the statute was controlling (App. 85a), and indeed instructed the jury in the words of the statute (App. 112a). When the court below decided to override the

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[1] As used herein, "Aplt Br." refers to the Brief for Appellant, "KM Br." refers to the Brief for Appellees, "US Br." refers to the Brief For The United States Supporting Appellees, and "AIF Br." refers to the Brief of The Atomic Industrial Forum, Inc., as Amicus Curiae. Lest there be confusion, it should be noted that the "Brief for the United States" cited in appellant's *opening* brief is the brief filed by the Solicitor General in response to the Jurisdictional Statement, while the "US Br." cited herein is the later brief filed by the Solicitor General following this Court's postponement of the determination of jurisdiction.

[2] Thus, e.g., in *Thiry* v. *Armstrong World Industries*, 661 P. 2d 515 (Ok. 1983), the court rejected a contention that punitive damages should be unavailable in product liability actions because the purposes of punitive damages are inapposite in such actions, declaring:

> A jury is authorized to "give damages for the sake of example, and by way of punishing the defendant" . . . "in *any action* for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed." [Citing 23 O.S. § 9]. Products liability clearly falls within the statutory scope of "any action" and is not within the contract limitation. [*Id.* at 517, emphasis in original].

Conversely, in *Burton* v. *Juzwik*, 524 P.2d 16 (Ok. 1974), the Oklahoma Supreme Court held that punitive damages *cannot* be awarded in a breach of contract case, because of the statutory exclusion of actions "arising from contract", declaring: "In resolving the issue relating to punitive damages, we must determine whether plaintiff's action comes within the purview of 23 O.S. 1971, § 9".

"strong presumption against preemption of *state laws* affecting such vital interests of its citizens as those involved in the instant case" (App. 24a, emphasis added), the only "state law" in Oklahoma to which it could have been referring was 23 O.S. § 9. Neither KM nor the Solicitor General suggests otherwise.[3] By holding that punitive damages are preempted in all radiation injury lawsuits against "plants handling nuclear material" (App. 24a), the decision below "amounts to a holding that [23 O.S. § 9], as applied to this class of cases, is invalid" and thus the decision is appealable. *United States* v. *Knox*, 396 U.S. 77, 79 n.2 (1969); see also *United States* v. *Brewster*, 408 U.S. 501, 504-507 (1972).[4]

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[3] Indeed, the briefs of both KM and appellant to the court below recognized that the availability of punitive damages was controlled by 23 O.S. § 9 (Aplt Br. 2-3 n.2).

The Solicitor General, noting that the Oklahoma Supreme Court has held punitive damages unavailable in suits against municipalities, speculates that that court might interpret § 9 as inapplicable to nuclear operators (US Br. 7 n.14, 8). That speculation is wide of the mark. The Oklahoma Supreme Court has made clear that it views § 9 as applicable *to all* tort actions against private defendants, and as foreclosing judicial discretion to withhold them even where they might appear to be inapposite. See *Thiry*, quoted *supra*, n.2. The Solicitor General cites nothing in Oklahoma law that could lead to a different result here. To be sure, the Oklahoma Supreme Court has held that punitive damages are unavailable in suits against municipalities (U.S. Br. 7 n.14), but that holding simply reflects "the general rule" recounted in *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 260 n.21 (1981), that "no punitive damages are allowed [against municipalities] unless expressly authorized by statute" (and see gen. *id.* at 259-263).

[4] The Solicitor General attempts an analogy to cases arising under 28 U.S.C. § 1257 (US Br. 2-4 & n.3), but overlooks that those cases turn on a procedural prerequisite that appears in § 1257 but not § 1254. In § 1257 cases, the party seeking review in this court is the one challenging the validity of the state statute, and a precondition to appeal is that the validity of the state statute have been "drawn in question" by the appellant in the state courts (§ 1257(2)) and a precondition even to certiorari is that a federal "title, right, privilege or immunity" was "specially set up or claimed" in the state courts (§ 1257(3)). These requirements are imposed to assure that a state court decision is not challenged in this Court on a ground

FACTS

KM complains that our statement of facts is "one-sided" (KM Br. 2). We noted in our opening brief that, "[a]s the jury returned a verdict for plaintiff, the evidence must be viewed in the light most favorable to plaintiff" and "[o]ur recitation of facts proceeds accordingly" (Aplt. Br. 8). KM's counterstatement at best reflects what the jury might have found (but did *not* find) the facts to be had it resolved the conflicts KM's way. We say "at best," because KM's version of the facts rests on carefully selected items of evidence taken out of context, and the overwhelming weight of the evidence pointed in plaintiff's favor. We cite a few instances in the margin.[5]

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that was not advanced to the state court, in part out of considerations "of comity . . . [which] require that the state courts be afforded the opportunity to perform their duty." *Webb* v. *Webb*, 451 U.S. 493, 499 (1981). See also *Wilson* v. *Cook*, 327 U.S. 474, 480 (1946); C. Wright, A. Miller & E. Cooper, 16 *Federal Practice and Procedure: Jurisdiction*, § 4013, p. 627 (1978); *id.*, § 4022, pp. 696-698; *id.* (Vol. 17), § 4036, p. 26; J. Moore, H. Bendix & B. Ringle, 12 *Moore's Federal Practice: Supreme Court Jurisdiction and Practice*, § 510.01, p. 8-56 (1982).

The Solicitor General would impose upon the lower federal *courts*, in § 1254(2) cases, the same burden of precise articulation as § 1257 imposes upon litigants. The simple answer is that the language of § 1257 that imposes that burden is not to be found in § 1254(2). Nor would it make sense to condition appellate access to this Court upon the particular choice of words used by the lower court to express its holding. If, as here, the lower court has "held invalid" a state statute as applied, the requirements of § 1254(2) have been fully met.

[6] 1. KM implies that Silkwood herself "spiked" her urine samples (KM Br. 3). That was a critical issue at trial: KM's contention was that Silkwood had carried plutonium from the plant to her apartment and there "spiked" her urine samples. The jury was instructed that if Silkwood intentionally brought the plutonium to her apartment it must find for KM (App. 100a). The jury expresaly found, in response to a special interrogatory, that Silkwood had not done so (I J.A. 202). That finding, which was sustained by the court of appeals (App. 8a, 20a-21a), is plainly supported by the overwhelming weight of the evidence, which demonstrates the virtual inconceivability that Silkwood, who was very health-conscious, would have, or even could have, spiked her urine sample with a form of

ARGUMENT

A. The Preemption Issue

1. In our opening brief, we showed that neither the Atomic Energy Act of 1954 nor any of the subsequently enacted atomic energy legislation was intended to pre-

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plutonium that she knew was not excretable from the body, and that came from a "lot" of plutonium at KM's plant to which Silkwood did not have access. (See App. 134a-136a, Pars. 17-22, and record sources cited thereat).

2. KM's defense of its effort to administer DPTA to Silkwood (KM Br. 3 n.4) is a *non-sequitur*. Whatever value DPTA may have in the treatment of contamination by *soluble* plutonium (i.e., plutonium the body can excrete), Silkwood was known to have been contaminated with *insoluble* plutonium (which cannot be excreted from the body). The experts on both sides testified—and the point is uncontradicted in the record—that DPTA is not effective against insoluble plutonium. (III J.A. 958, IV J.A. 1627).

3. KM's characterization of Silkwood's contamination as posing a "negligible probability of injury" (KM Br. 4, n.6)—in the face of a jury finding to the contrary—ignores (1) that two expert witnesses testified that Silkwood had suffered serious physical injury by reason of her contamination (see II J.A. 912-929, 934-935, 977-979, 990-993); (2) that there was a wide margin of error in the measurements at the autopsy, and thus Silkwood in a three day period may have been contaminated by amounts substantially exceeding AEC numerical *lifetime* exposure limits even for industrial workers (Aplt Br. 12 and n.21); (3) that even if Silkwood's contamination was at the lower end of the range, that was 2½ times the AEC *lifetime* exposure limits for members of the public (*id.* 12); and (4) that, as is generally understood and as the AEC Regional Director testified, AEC numerical exposure limits are not "safe" limits, which is why the AEC independently exhorted operators to keep exposure levels "as low as practicable" (*id.* 9 and n.14; see also surces cited at App. 64a-66a).

4. KM attempts (KM Br. 6 n.9) to discredit the testimony of Dr. Karl Morgan—who was for 29 years the Director of Health Physics at Oak Ridge National Laboratory (Aplt Br. 12)—on the ground that Dr. Morgan had neither seen the plant nor consulted its personnel. As the trial occurred four years after the plant had closed, such observation was not possible. But Dr. Morgan had reviewed voluminous contemporaneous documentary materials reflect-

empt state law tort actions arising out of nuclear incidents. To the contrary, as we showed, such actions continued to be viable after the passage of the 1954 Act, and Congress has chosen not to limit the relief available in such cases except in specific and precisely stated ways not applicable here. Congress has never expressed any intention that plaintiffs in such state law tort actions be deprived of whatever right the state tort law may grant to seek puntive damages—a traditional tort law remedy available in all but a handful of states.

KM and the *amici* supporting its position do not contend that Congress has manifested any particular inten-

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ing the conduct of the KM plant before formulating his opinions. These are identified at P. Ex. 1-D and Tr. 1550-52.

5. KM (KM Br. 6) and the Solicitor General (US Br. 16 n.22), while not disputing our statement that KM could not locate over 40 pounds of plutonium, declare that the statement is "misleading" (US Br. 16 n.22) because subsequent studies determined that much of the missing plutonium was "held up" in the plant. Both briefs rely upon the direct testimony of a former KM official that 10.9 kilograms of the plutonium were "held up" in the plant, and thus that only 4.4 kilograms (10 pounds) had escaped from the plant—an amount only slightly in excess of the maximum permissible escape tolerated in NRC regulations. But on cross-examination the witness acknowledged that the KM study had gone no further than to estimate the amount "held up" as falling somewhere between 7.9 and 13.9 kilograms, thus making it equally likely that the amount that had *escaped* the plant was 7.4 kilograms (Tr. 8034-35)—nearly twice the maximum permissible under NRC regulations. And a subsequent study by the government estimated that the amount "held up" in the plant could be as little as 4.9 kilograms, meaning that the amount that had escaped the plant could be as high as 10.4 kilograms (Tr. 8036-44; P. Ex. 83)—nearly three times the NRC maximum. In any event, all of the estimates of "hold up" were highly speculative, for, as the government study acknowledged, efforts to measure "held up" plutonium within a plant were untested and experimental, and reduced, ultimately, to extrapolations and judgment calls. (P. Ex. 83, pp. 7, 9, 15, 17-19; Tr. 8046-58).

6. We discuss *infra*, pp. 13-14 n.12, the results of government investigations of Silkwood's contamination (KM Br. 5) and of the allegations of unsafe conditions she had made to the AEC prior to her death (*id.* at 5, n.8).

tion to preempt punitive damages in such cases. Indeed, they deny that it is their burden to make such a showing. See, e.g., KM Br. 23. Rather, they argue more broadly that Congress intended to preempt the entire field of regulation of nuclear safety, and that punitive damages in tort suits arising out of nuclear incidents are a form of such regulation and are therefore preempted. For this argument, KM and its *amici* rely heavily on the following passage in this Court's recent decision in *Pacific Gas & Electric Co.* v. *State Energy Resources Commission*, —— U.S. ——, ——, 51 L.W. 4449, 4455 (April 20, 1983):

> [T]he federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states.[25]

[25] In addition to the opportunity to enter into agreements with the NRC under § 274(c), Congress has specifically authorized the states to regulate radioactive air pollutants from nuclear plants, Clean Air Act Amendments of 1977, § 122, 42 U.S.C. § 7422 (Supp. III 1979), and to impose certain siting and land use requirements for nuclear plants, NRC Authorization Act for Fiscal Year 1980, Pub. L. 96-295, 94 Stat. 780 (1980).

The argument of KM and its *amici* proves too much. By their definition, "the entire field of nuclear safety concerns" includes not only the punitive damages remedy in a state-law tort suit arising out of a nuclear incident, but the compensatory damages remedy as well. For, as we showed in our opening brief (at 42-43), and as KM and its *amici* acknowledge (see KM Br. at 23; US Br. at 22-23), the availability of awards of compensatory damages in tort actions has a regulatory impact. But KM and its *amici* do not dispute that the federal atomic energy laws were not intended to preempt awards of compensatory damages. And this Court was well aware of the non-preemption of state tort actions when it wrote the quoted passage in *Pacific Gas & Electric*.[6]

[6] In *Duke Power Co.* v. *Carolina Env. Study Group*, 438 U.S. 59 (1978), this Court recognized that the Price-Anderson Act had

KM and its *amici* recognize that their effort to treat the passage in *Pacific Gas & Electric* as applicable to state tort law fails unless they can reconcile the passage with the conceded non-preemption of state-law tort actions for compensatory damages. Thus, they argue that in the Price-Anderson Act Congress "expressly ceded" to the states the power to award compensatory damages arising out of nuclear incidents (KM Br. 29-30; US Br. 32). This argument does not bear analysis.

As this Court recognized in *Duke Power*, the victims of a nuclear incident enjoyed the "right *prior to the enactment of the Price-Anderson Act* . . . to utilize their existing common-law and state-law remedies to vindicate any particular harm visited on them from whatever sources." 438 U.S. at 88-89 n.33 (emphasis added). Indeed, the Solicitor General's brief concedes that prior to Price-Anderson the 1954 Act did not preempt state law actions for compensatory damages. (US Br. 26).[7] Price-Anderson was passed to deal with the deterrent effect on entry into the nuclear industry that just such tort suits posed for nuclear companies. See Aplt Br. at 24-26; *Duke Power*, 438 U.S. at 64.

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been adopted for the very purpose of providing a means to satisfy the potential state law tort liability of companies in the nuclear industry. And in *Pacific Gas & Electric* itself the Court expressly alluded to Price-Anderson and to the limitations established by that Act on private liability in tort actions arising from nuclear incidents. 51 L.W. at 4457.

[7] That brief errs, however, in stating that prior to the 1954 Act there was "no role whatever for the states" (US Br. 13, citing *Pacific Gas & Electric*). While that is true with respect to the *management* of nuclear facilities (the point made in *Pacific Gas & Electric*) it is *not* true with respect to tort damage litigation. There were numerous private contractors assisting the federal government in the conduct of its "absolute monopoly over atomic energy" (US Br. 13). Those contractors were vulnerable to state-law tort actions, and precisely because they were the government had included provisions in their contracts indemnifying them in the event of tort liability. See *Hearings before the Joint Committee on Atomic Energy on Government Indemnity*, 84th Cong., 2nd Sess. (1956), at 76-85 (hereinafter "*1956 Hearings*").

Thus, the function of Price-Anderson was not to confer an authority upon the states that the states would not otherwise have had. The predicate of Price-Anderson was that the Atomic Energy Act of 1954 had not preempted state-law tort actions against private companies involving nuclear incidents.

Reflective of this history, not a word in Price-Anderson purports to be a grant of authority to the states to entertain suits for compensatory damages. Rather, the language and structure of the Act assume that such authority already existed in the states. And, the footnote to the passage from *Pacific Gas & Electric* relied upon by KM and its *amici* shows that this Court did not regard Price-Anderson as "expressly ced[ing]" any authority to the states. That footnote, which we have quoted *supra* at 6, lists the powers that Congress "expressly ceded" to the states; the footnote contains no reference to the Price-Anderson Act or to the states' power to entertain suits for compensatory damages.

Thus, the quoted passage in *Pacific Gas & Electric* cannot be read as broadly as KM and its *amici* would have it read. As we showed in our opening brief, Congress has marked out a very different role for the states in providing remedies in tort suits involving nuclear incidents than in the licensing and direct regulation of the nuclear industry. In the latter area, Congress has determined that with respect to matters of safety and health the federal government should occupy the entire field except where it expressly cedes regulatory power to the states. The *Pacific Gas & Electric* passage must be understood as referring only to that area. For in the former area—state law tort suits against private nuclear companies—it has long been clear, without any express ceding of power, that Congress did not in the 1954 Atomic Energy Act, nor in any subsequent atomic energy legislation, intend to preempt or occupy the field.

Accordingly, KM and its *amici* cannot rely simply on the assertion that punitive damages are preempted be-

cause the entire field of nuclear safety is preempted. Rather, they must show that Congress, while not preempting traditional state-law tort actions in the field of nuclear safety, nevertheless intended to preempt a traditional part of such actions—punitive damages. Such a showing would require "a clear manifestation of [Congress'] intention to do so." *New York Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 413 (1973); see Aplt Br. at 21-22. KM and its *amici* have not pointed to a single word in the history or language of the various atomic energy acts that expresses a congressional intention to carve punitive damage remedies out of state-law tort actions in the nuclear safety area. Indeed, all the evidence shows that Congress meant to leave the state tort law entirely unaffected except as it expressly provided otherwise (Aplt Br. 24-41).[8]

2. The reliance of KM and its *amici* on the passage from *Pacific Gas & Electric*—more generally their reliance on the notion that state-law punitive damages are preempted as part of a general federal occupation of the field of nuclear safety—fails for another reason: that reliance depends on a mischaracterization of the role of punitive damages under Oklahoma law. Thus, KM's brief asserts that "[t]he purpose of the [punitive damages] award was to punish Kerr-McGee for maintaining allegedly unsafe plant conditions and for 'permitting' the escape of plutonium" (KM Br. 9). And the Solicitor General's brief asserts that punitive damages are awarded to punish "conduct the state deems unsafe" (US Br. 10), "conduct found by a jury to endanger the public safety" (*id.* at 32), "what the states may deem unsafe practices" (*id.* 34). See also AIF Br. 9.

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[8] Given that punitive damages are an integral part of tort law in all but a handful of states (Aplt Br. 41 n.46), and have indeed been an important part of the law of damages for centuries (see Brief for the New Jersey Department of the Public Advocate as Amicus Curiae, pp. 13-26), it is telling that Congress gave not the slightest expression of an intention to take the unprecedented step of excising this remedy from state-law tort actions.

Such characterizations are necessary to the contention that awards of punitive damages are designed to regulate safety practices in the operation of nuclear facilities. But the conduct described in the above-quoted characterizations is conduct that is appropriately the basis for an award of compensatory damages, not an award of punitive damages. As we showed in our opening brief, punitive damages are not a remedy for "unsafe" practices or conditions; compensatory damages are. Punitive damages are not awarded based on the level of radiation that might have been emitted—which is the subject of federal concern. Punitive damages are awarded as a remedy for "outrageous" conduct of a defendant: conduct motivated by a malicious or reckless state of mind. When such conduct occurs, regardless of the level of radiation emissions involved, the states have an interest in punishing it that is distinct from and transcends questions of nuclear safety. See Aplt Br. 43-49.

3. The Solicitor General's brief compounds the error just discussed. That brief suggests that the jury instructions in this case authorized punitive damages if KM was found to have failed to exercise "reasonable care." U.S. Br. 20. The brief then contends that "to allow[] a jury to define 'what constitutes the exercise of reasonable care in handling plutonium' [would] invade[] the field of nuclear safety concerns by setting up substantive standards in competition with those fixed by federal law." *Ibid.* But the jury instructions in this case did not authorize punitive damages on a finding of lack of "reasonable care." "Reasonable care" was relevant only to the question whether Kerr-McGee was guilty of negligence and thus liable for *compensatory* damages; the jury was instructed that the test for *punitive* damages was whether Kerr-McGee was guilty of "oppression, fraud or malice, actual or presumed" (a standard that would be met if Kerr-McGee was "grossly and wantonly reckless in exposing others to dangers"). App. 112a.[10]

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[10] The district court submitted plaintiffs' claim for compensatory damages to the jury on two theories—strict liability (App. 98a-

In fact, the very issues that the Solicitor General's brief argues Congress could not have meant to leave to state court juries—issues of nuclear safety and reasonable care—Congress unquestionably decided *would* be left to such juries in determining liability for compensatory damages under state law. The Solicitor General's brief, proclaiming "the obvious ineptness of state common law for creating substantive rules of safe conduct applicable to nuclear facilities" (US Br. 26), argues as if Congress in Price-Anderson took such questions from state court juries by mandating strict liability as the standard in state-law tort suits involving nuclear incidents:

> If licensees were strictly liable, the only issues in state tort litigation would be causation and the calculation of the damages required to compensate the victim of harm; questions about the duty of care would be irrelevant. That division of authority is desirable from a federal perspective as well. Because there is no federal interest in specifying how compensation (up to a certain limit) is to be distributed, it is efficient to leave that matter to the states. By contrast, the definition of safety standards, and their enforcement in cases where external costs alone provide insufficient incentive for compliance, are matters that call for the expert judgment of the NRC. [US Br. at 26]

100a) and negligence (*i.e.*, lack of "reasonable care") (App. 100a-101a)—and directed the jury to answer a special interrogatory as to whether it found the latter (App. 125a). This precaution assured that, if the jury found negligence (as it did, I J.A. 202), there would be no need for a retrial were the Tenth Circuit to reverse the district court's conclusion that Oklahoma would impose strict liability upon operators of nuclear facilities.

In the passage quoted at US Br. 20, the trial judge was instructing on the weight to be accorded evidence of KM's compliance with AEC regulations in determining (1) whether KM had exercised reasonable care for purposes of the negligence claim, and (2) whether KM was guilty of "reckless and wanton conduct" for purposes of punitive damages (App. 102a). The trial judge was *not* charging that punitive damages could be awarded for breaches of "reasonable care".

But Congress did *not* mandate strict liability in such suits. Congress required a limited category of nuclear operators, which did not include KM, to, by waiver of defenses, accept strict liability as the standard of liability for a narrowly defined category of cases termed "extraordinary nuclear occurrences" (ENO's). Congress decided that in all other tort actions arising out of nuclear incidents the standard of liability would be that set by "traditional rules of [state] tort law." Aplt Br. at 35; see gen. *id.* at 29-36. So far as Congress was concerned, it was perfectly acceptable if states chose negligence—"reasonable care"—as the standard for *all* suits against operators (like KM) not covered by Price-Anderson, and indeed against covered operators as well except in the event of an ENO.[11]

Thus, the arguments in the Solicitor General's brief respecting the role of juries in nuclear safety cases are most appropriately directed to the question whether *compensatory* damages should be preempted in such cases. Certainly, those arguments provide no basis for distinguishing between compensatory and puntive damages in determining the preemptive effect of the federal atomic energy acts. And that is the burden of appellees and their *amici* in this case. We noted in our opening brief that no previous case in any area of federal regulation has attributed to Congress an intention to preempt only the punitive damages aspect of state-law tort actions. Neither KM nor *amici* dispute the accuracy of that statement, nor do they marshall any evidence to demonstrate that in this instance Congress should be found to have intended such an extraordinary result.

4. The Solicitor General's brief argues that punitive damages are preempted because Congress has authorized

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[11] The briefs of KM and the Solicitor General attack the reliability of the jury system and thus implicitly challenge the congressional determination to leave such questions to juries. That decision was and is for Congress to make, and in enacting and extending Price-Anderson Congress indicated complete satisfaction with reliance on the jury system.

the NRC to punish *violations of NRC regulations* and the NRC, in exercising that authority, takes account of willfulness and recklessness in scaling penalties. But as noted in our opening brief (at 49), it is only in the event of violations of its regulations that the NRC can punish at all. And that constraint is not coterminous with the states' interest in punishing malicious and reckless behavior.

As the district court demonstrated at length (App. 64a-69a), no-one—least of all the NRC—suggests that its regulations are a guarantee of safety.[12] Yet the NRC

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[12] A few examples from the record will make the point:

1. KM states (KM Br. 5 n.8) that following Silkwood's death the 39 allegations that she and other local union officials had made to the AEC of unsafe conditions at the plant were investigated, and that only "[t]hree violations [of regulations] . . . were noted." But the report found that *twenty* of the allegations of unsafety were wholly or partially substantiated; of these, seventeen reflected unsafe conditions that did not constitute violations of AEC regulations (II J.A. 792). Among the unsafe conditions that did *not* violate regulations were: continuing regular production in contaminated areas before the contamination was removed (*id.* at 796-797); failing to advise employees of required respiratory protection (*id.* at 797-798); allowing contamination to sit for 14 days without removal (*id.* at 799); misvalving errors resulting in contamination that could have caused a criticality problem (*id.* at 800; KM's failure to notify AEC of the errors was found to be a violation of AEC regulations, but the errors themselves were not (*ibid.*)); contamination leaks (*id.* at 801); waste jugs filled beyond capacity (*id.* at 801); and plant contamination exceeding safe operating limits (*id.* at 802-803).

2. KM notes (KM Br. 5), that the AEC concluded that the damage to Silkwood's property was not caused by violations of AEC regulations. That conclusion, if accurate, shows that, without any violation of regulations, contamination could occur of such magnitude that a crew ranging from two to seven employees *dressed in full protective clothing with full face respirators*, and working under the supervision of AEC and Oklahoma public health officials, had to devote nearly a month to dismantling Silkwood's apartment —tearing up bathroom tiles and removing refrigerator, stove, TV, sofa, tables, carpeting and twelve 55-gallon drums of smaller articles—before federal and state health officials would declare the

cannot punish—and does not purport to punish—even the deliberate infliction of radiation injuries through exposures below the numerical limits stated in the regulations.[13]

A nuclear operator could, without violating any of the NRC's regulations, maliciously or recklessly inflict serious injury through radiation exposure. See Aplt Br. at 48. Indeed, KM asserts that the NRC's exposure limits were not violated in this case. See KM Br. at 4; but see Aplt Br. at 12. The NRC's regulations do not provide for any punishment in such a situation, no matter how malicious or reckless the state of mind with which the conduct was undertaken.

The Solicitor General acknowledges that states may punish corporate executives (albeit apparently not corporations themselves) for intentional irradiation, even where the amount of irradiation does not transgress the NRC exposure limits. US Br. at 33 n.38. Presumably, the Solicitor General distinguishes between the executives

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apartment habitable (Motion to Dismiss or Affirm, A20-A22; See also, P. Exh. 126, D. Ex. 27).

3. As the US Brief acknowledges, p. 17, n.23, the NRC regulation on removal of plutonium from the plant (requiring operators to monitor against removals of half a gram or more) is a "security system—designed to prevent sabotage and theft of weapons materials—[and is] not intended to be a safeguard against removal of smaller amounts of plutonium." One-half gram is enough plutonium to give 35 million people their lifetime lung burden (Aplt Br. 14).

[13] We noted in our opening brief (p. 12) the testimony of AEC's Regional Director that the AEC's "as low as practicable" exhortation lacked "regulatory teeth" and that in consequence KM gave "short shrift" to contamination incidents that did not exceed the specific *numerical* exposure limits. The NRC's enforcement policies —upon which the opposing briefs place such great weight—confirm that penalties are assessed only for violations of the numerical exposure limits (47 F.R. 9994, Supplement IV, Pars. A-1, B-1, C-1, D-1). Therefore, only in the case of contaminations exceeding the numerical limits does the NRC have the opportunity to punish at all, much less to punish intentional or reckless conduct more severely than innocent conduct.

on the one hand, and the corporations on the other, on the theory that if the states can punish the corporations in those circumstances, the corporations would be under pressure to conform to standards more restrictive than those of the NRC. But—putting aside that the more restrictive standard is simply to refrain from engaging in malicious or reckless conduct—if states can punish intentional or reckless conduct respecting nuclear safety by imprisoning or fining the corporate executives responsible (or imposing punitive damages upon them), there will be at least the same impact upon corporate behavior (indeed, quite likely a greater impact) than by "fining" the corporate entities through awards of punitive damages. See *Owen* v. *City of Independence*, 445 U.S. 622, 653-657 & n.37 (1980); *Wood* v. *Strickland*, 420 U.S. 308, 317-321 (1975).

Congress could, presumably, direct the NRC to punish malicious and reckless acts of private nuclear companies even when within regulatory exposure limits, and could, presumably, coincident with enactment of that legislation preempt the states' rights to visit punishment for such conduct. But Congress has not as yet enacted that statute, and there is no evidence that in its absence Congress has preempted the states' power to punish such conduct.[14]

5. Appellees and their *amici* argue that punitive damages should be preempted because such damages might deter potential nuclear operators from entering the industry. This argument is doubly flawed:

a. The argument has no necessary connection to health and safety concerns, and no logical stopping place. The same argument could be made for preemption of state punitive damages for, e.g., engaging in racial discrimi-

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[14] Indeed, as noted in our opening brief, pp. 49-50, n.48, there is a serious question whether Congress *could* preempt state power to punish malicious and reckless acts in the absence of federal assumption of a parallel role or, at the least, a congressional finding of a paramount federal interest that justified creating the vacuum.

nation, willfully overcharging customers, or recklessly violating other mandates of state law that have not been preempted. See *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 633 (1981) ("We do not . . . accept appellants' implicit suggestion that [general statements reflecting a Congressional intent to encourage the production and use of coal] demonstrate a congressional intent to pre-empt all state legislation that may have an adverse impact on the use of coal."); *Pacific Gas & Electric*, *supra* (allowing a state to halt construction of nuclear facilities altogether on economic grounds).

The deterrence argument made by appellees and their *amici* reduces to a contention that Congress' interest in promoting nuclear power must be construed as conferring upon nuclear operators a blanket immunity from the ordinary consequences of doing business that all *other* industries confront. Not only is there no evidence in the legislative history of the various atomic energy statutes that Congress intended to confer such an immunity, but the contrary indication is manifest. Thus, as our opening brief recounted (Aplt Br. 30), Congress received testimony from the AEC that:

> Each claimant has *the same standing to sue and to recover which he has with respect to liability in connection with any other industry.* Similarly, each claimant is subject to the same defenses that can be asserted by any other industry. [Emphasis added.]

Indeed, when Congress did make special provision for the nuclear industry it did so in a way that was carefully limited to certain nuclear operators (not including Kerr-McGee) and only in the event of an "extraordinary nuclear occurrence" (not present here), because, as the AEC had explained (Aplt Br. 35):

> It would appear eminently reasonable to avoid disturbing ordinary tort law remedies with respect to damage claims *where the circumstances are not substantially different from those encountered in many activities of life* which cause damage to persons and property. [Emphasis added.]

With respect to all other industries, including federally regulated industries, Congress has never undertaken to prohibit the award of punitive, but not compensatory, damages in state law tort actions. The decision of the court below, if affirmed, would provide the nuclear industry a unique immunity from the normal operation of state tort law in the face of abundant evidence that Congress did not so intend. (Aplt Br. 30-38).

b. In any event, the proposition that Congress immunized KM (and others like it) from punitive damages in order to encourage entrance into the field is an unlikely supposition respecting congressional intent. Few nuclear operators could have been expected to act maliciously or recklessly in the handling of plutonium, and it is not clear that Congress would have welcomed into the field those who would. It is unlikely, therefore, that Congress would have seen punitive damages as a significant deterrent to entry, let alone one that should be knocked down.[15] On the other hand, given that Congress opted not to immunize or indemnify companies like KM in any way from awards of *compensatory* damages (Aplt Br. 26 & n.32; US Br. 24), and left the states free to impose such damages on any basis they chose—e.g. reasonable care

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[15] When Price-Anderson was first being considered in 1956, the AEC proposed that the indemnity to be afforded by that Act to covered operators not apply in the case of "loss or damage caused by bad faith, willful misconduct or gross negligence." *1956 Hearings* at 44. The AEC explained that the indemnity it had extended to government contractors in the past (see n.7, *supra*) had been inapplicable in such cases. *1956 Hearings* at 77-85. Congress did not doubt what this experience showed: that companies would enter the field without protection for such acts. Rather, Congress rejected the AEC's proposal because the *other* object of Price-Anderson—to assure that in the event of a nuclear catastrophe at a covered facility compensation would be available to the public—would be frustrated by the exclusion: "The suggestion . . . that willful damages be excluded was not accepted *since the damage to the public is the same, whether caused by any means—willful or nonwillful.*" S. Rep. No. 296, 85th Cong., 1st Sess. (1957) at 18 (emphasis added).

or strict liability—regardless of compliance with NRC regulations, such companies faced the far more likely prospect of enormous compensatory liability for even "innocent" conduct that inflicted radiation injuries. Compensatory damages of this nature surely would have been perceived by Congress as a more powerful deterrent to entry than the possibility of punitive damages in the rare instance of "outrageous" conduct. There is thus no basis for attributing to Congress, in the absence of a shred of supportive legislative history and in the face of uniform legislative history that state tort law was not to be displaced, a decision to preempt punitive but not compensatory damages. Cf. *Pacific Gas & Electric*, 51 LW at 4457.

B. KM's State Law Contention

KM contends that the jury's punitive damage award was "incident to the personal injury claim" and has been "nullifie[d]" by the reversal of the award of actual damages for Silkwood's personal injury. KM Br. 41. The court below did not hold the punitive damage award "nullified" on that state law ground, and this Court is hardly the place for the claim to receive its first airing.

The preemption issue remains in this case no matter what disposition might ultimately be made below of KM's "nullification" claim. Under the Oklahoma statute, punitive damages are available even in a case where the only injury is to property.[16] The court below has affirmed the jury's award of actual damages for injury to property (App. 21a). There was a nexus between the reckless conduct shown on this record (which "permit[ted] plutonium to escape into the public domain," App. 85a) and

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[16] See, e.g., *Garland Coal & Mining Co.* v. *Few*, 267 F.2d 785, 790 (10th Cir. 1959); *State ex rel Pollution, etc.* v. *Kerr-McGee Corp.*, 619 P.2d 858, 865 (Ok. 1980); *Taylor* v. *Parker*, 611 P.2d 113 (Ok. 1980); *Davidson* v. *First Bank & Trust Co.*, 609 P.2d 1259 (Ok. 1977); *Z.D. Howard Co.* v. *Cartwright*, 537 P.2d 345, 347-348 (Ok. 1975); *Jones* v. *Lennington*, 629 P.2d 805 (Ok. App. 1981); *Sopkin* v. *Premier Pontiac, Inc.*, 539 P.2d 1393, 1397 (Ok. App. 1975).

the damage to Silkwood's property, and thus under the Oklahoma statute the district court was required to instruct the jury, as it did, that even if the only injury suffered by Silkwood was to property, punitive damages could be awarded (App. 109a-113a).[17]

Therefore, even if the decision below finally resolved appellant's quest for personal injury damages—and it does not [18]—that ruling would not end appellant's entitlement to punitive damages under Oklahoma law. Only preemption could have the latter effect. At most, KM's state law argument goes to the *amount* of the punitive damages appellant may recover.[19] The court below, how-

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[17] KM now suggests (Br. at 44-45)—although it did not argue below—that punitive damages could not have been awarded on the basis of injury to property, because the jury was instructed that compensatory damages for that injury could be awarded on the basis of strict liability. Contrary to KM's implicit assumption, however, Oklahoma law does not bar an award of punitive damages simply because the claim for *compensatory* damages is governed by strict liability; the availability of *punitive* damages turns upon a jury finding of willful or reckless state of mind, which may exist no matter what standard controls compensatory damages. See, e.g., *Garland Coal & Mining Co.* v. *Few*, 267 F.2d 785 (10th Cir. 1959); *Thiry* v. *Armstrong World Industries*, 661 P.2d 515 (Ok. 1983). The jury was properly instructed on the different standard governing punitive damages (App. 112a-113a).

[18] As we have indicated (Aplt Br. 8, n.13), plaintiff is not foreclosed by the decision below from pursuing a claim that Silkwood's personal injuries were the result of *intentional and willful misconduct*, and the Workers' Compensation Act does not bar such a claim, see *Hull* v. *Wolfe*, 393 P.2d 491, 493 (Ok. 1964). KM disputes our right to secure a new trial on personal injuries on that theory. (KM 41-42, n.46). We do not further belabor the point, for that is an issue to be addressed in the first instance by the district court (to whom the matter has been "remanded . . . for further considerations consistent herewith," App. 24a).

[19] The question whether the *existing* punitive damage award may stand despite the Workers' Compensation Act ruling (or whether, instead, there must be a remittitur or new trial on the amount of punitive damages) is not before this Court. Any contention by KM that the amount should be affected by the Workers Compensation Act ruling may have been waived, for KM made no such

ever, by ruling punitive damages altogether preempted, has pretermitted appellant's ability to recover punitive damages in *any* amount.

CONCLUSION

The decision below should be reversed.

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argument below. Even if not waived, KM's argument for a reduction is tenuous at best, given the state of Oklahoma law. Under Oklahoma law, a determination that the *compensatory* damages awarded by a jury must be reduced does not necessarily compel any adjustment of the *punitive* damages awarded. See *Garland Coal & Mining Co.* v. *Few*, 267 F.2d 785, 791 (10th Cir. 1959); *Amoco Pipeline Co.* v. *Montgomery*, 487 F. Supp. 1268, 1273 (W.D. Ok. 1980); *Hobbs* v. *Watkins*, 481 P.2d 746, 752, 753-754 (Ok. 1971). This is a reflection of the general principle that an award of punitive damages is aimed not at the injury for which the plaintiff is being compensated, but at "the gravity of the . . . risk of harm to the public" posed by the defendant's malice or recklessness. *Thiry* v. *Armstrong World Industries*, 661 P.2d 515, 518-519 (Ok. 1983). See also *Cates* v. *Darland*, 537 P.2d 336 (Ok. 1975); *State ex rel. Pollution, etc.* v. *Kerr-McGee Corp.*, 619 P.2d 858, 861 (Ok. 1980); *Moyer* v. *Cordell*, 228 P.2d 645, 650 (Ok. 1951); *Jones* v. *Lennington*, 629 P.2d 805, 807 (Ok. App. 1981).

No. 81-2159

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ALEXANDER STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

BILL M. SILKWOOD, Administrator of the Estate of KAREN G. SILKWOOD, Deceased,

Appellant,

v.

THE KERR-McGEE CORPORATION, a Delaware Corporation, and THE KERR-McGEE NUCLEAR CORPORATION, a Delaware Corporation,

Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

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BRIEF *AMICUS CURIAE* OF ARIZONA, CONNECTICUT, HAWAII, LOUISIANA, MASSACHUSETTS, NEVADA, NEW JERSEY, NEW YORK, OHIO, PENNSYLVANIA, SOUTH CAROLINA, TEXAS, VERMONT, WISCONSIN AND WYOMING IN SUPPORT OF APPELLANT

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Question Presented

Whether the operator of a nuclear facility that causes personal injury to an individual, through oppressive or malicious mishandling of plutonium, is exempt from a punitive damage award authorized under State law.

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No. 81-2159

IN THE

Supreme Court of the United States

October Term, 1982

BILL M. SILKWOOD, Administrator of the Estate of KAREN G. SILKWOOD, Deceased,

Appellant,

v.

THE KERR-MCGEE CORPORATION, a Delaware Corporation, and THE KERR-MCGEE NUCLEAR CORPORATION, a Delaware Corporation,

Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF ARIZONA, CONNECTICUT, HAWAII, LOUISIANA, MASSACHUSETTS, NEVADA, NEW JERSEY, NEW YORK, OHIO, PENNSYLVANIA, SOUTH CAROLINA, TEXAS, VERMONT, WISCONSIN AND WYOMING IN SUPPORT OF APPELLANT

Interests of *Amici*

This brief is filed by several States, pursuant to Rule 36 of the Rules of this Court, in support of Appellant's position that a State law authorizing punitive damages against a company that causes injury through its oppressive or malicious conduct is not preempted by Federal law when

applied to a company handling plutonium. Virtually all *amici*, by statute or common law, authorize the awarding of punitive damages against a party that causes injury through its oppressive or malicious conduct—regardless of the industry in which defendant operates. *Amici*, therefore, urge this Court to reverse the ruling below, in *Silkwood* v. *Kerr-McGee Corp.*, 667 F.2d 908 (10th Cir. 1981), that such damages are preempted when awarded against a company holding a license from the U.S. Nuclear Regulatory Commission ("NRC").

The Court of Appeals ruling failed to give the proper presumption of validity to State law, and impermissibly interfered with the paramount interests of each State in fashioning appropriate remedies for tortious conduct that produces injury within the State. Moreover, the decision below created an entirely new and erroneous standard for resolving presumption questions. The Court of Appeals held that the State law was preempted even though it created no conflict with Federal law, and even though it did not stand as an obstacle to Congressional policy. The Court reasoned that the State law "competes substantially" with Federal regulation, 667 F.2d at 923, because it seeks to accomplish objectives similar to the Federal scheme. Unless reversed by this Court, this new standard could bring into question many proper State laws enacted under the police power in other substantive areas that seek to promote the health, safety and welfare of State residents. In addition, the decision below carves out an exception from State tort law of general applicability in favor of a single industry, the nuclear industry, although Congress has never decreed that this industry should be exempt. Moreover,

the decision artificially divides the package of State tort remedies into compensatory and punitive elements, holding the latter to be preempted, whereas neither this Court nor Congress has authorized such a splitting of the remedies available to a victim under State tort law. In addition, the ruling incorrectly concludes that punitive damages are the equivalent of regulation, whereas they also serve as an additional means for compensating the injured party.

Statement of the Case

This action was initiated by the representative of the Estate of Karen G. Silkwood (hereinafter "Silkwood" or plaintiff), for personal injury and property damages suffered when Silkwood was contaminated with plutonium in November 1974. The parties stipulated below that the plutonium which caused the contamination came from the plant of defendant Kerr-McGee Corporation, by whom Silkwood was then employed. See the decision below, 667 F.2d at 913, 921. The plant, located in Oklahoma, fabricated fuel pins containing plutonium for use in commercial nuclear reactors.

The jury, finding that defendant had acted in an oppressive or malicious manner in allowing the plutonium to get out of the plant, awarded punitive damages of $10 million in addition to damages for personal injury and property loss. The jury verdict was upheld by the District Court, *Silkwood* v. *Kerr-McGee Corp.*, 485 F. Supp. 566 (W.D. Okla. 1979), but as previously noted the Court of Appeals reversed portions of the judgment, holding that the statute authorizing punitive damages was preempted as applied to a nuclear facility.

The statute under which punitive damages were awarded is an Oklahoma law of general application, 23 Okla. Stat. §9. The section provides:

> In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant.

In upholding the jury award, the District Court noted that the liability depended on the fact that defendant had permitted the plutonium to escape from its facility and to contaminate Silkwood and her apartment. The Court held that the jury was entitled to award punitive damages for oppressive or malicious conduct by Kerr-McGee. The Court noted that there was evidence of Kerr-McGee's failure to handle the plutonium properly:

> . . . One plaintiff's witness, Dr. Morgon, offered his opinion that if rated or graded for their operation of the Cimarron facility, defendants should receive an "F" or failing grade. One defense witness, a regional director of the NRC, himself stated that the facility would in his judgment receive a "C." . . .

485 F. Supp. at 586. The Court also said:

> Plaintiff's evidence established substantial, credible evidence of poor training, poor security, workers who knew of a variety of ways to remove large amounts of plutonium from the facility without detection, workers indifferent to the hazards of plutonium, and much more, all of which tended to establish the propriety of a punitive award. There was conflicting evidence, how-

> ever subject to credibility tests, of an uninformed or indifferent management . . .

Id. at 591.

The Court noted the hazards that were posed by the escape of plutonium from the facility, saying:

> . . . A Kerr-McGee witness characterized the implications of this [escape of] 1 pound of plutonium in the public domain as "sheer havoc and death." Even the potentially very grave dangers of one half gram of plutonium in the public domain were agreed upon by virtually all witnesses . . .

Id. at 576.* The Court concluded that punitive damages could be awarded by the jury if Kerr-McGee knew of the escape of plutonium from the facility, or knew that its employees repeatedly were being exposed to plutonium, but did nothing to remedy the situation. *Id.* at 584.

In reversing the award of punitive damages, the Court of Appeals held that Federal regulations preempted. It said that the NRC had exclusive jurisdiction to regulate radiation hazards associated with nuclear energy, and that the punitive damage award "competes substa[illegible]ally" with such regulation. *Id.* at 923. The Court of Appeals recognized the hazards of plutonium, saying:

> It is acknowledged, however, that plutonium is one of the most carcinogenic and dangerous substances known.

667 F.2d at 913.

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* Plutonium is "one of the most toxic substances known to man," and "[o]ne thirty-millionth of an ounce, less than a pollen grain, will cause cancer if inhaled or swallowed." Senate Report 93-980, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. and Ad. News at 5471 n.1.

Circuit Judge Doyle dissented, saying that Federal preemption of an entire field should not be presumed. *Id.* at 927. Thus, he said, even assuming that Congress preempted State *regulation* of radiation hazards, it would not follow that a general statute authorizing punitive damage awards in lawsuits between private parties would be preempted. *Id.* at 927, 929.

The only issue before this Court is whether the punitive damage statute was preempted. Other conceivable grounds for challenging the judgment—such as possible excessiveness—were not considered by the Court of Appeals, and are not ripe for review at this time. Similarly, the question of whether Kerr-McGee was in substantial compliance with NRC regulations and, if so, whether it was therefore not subject to punitive damages, was not considered by the decision below. 667 F.2d at 923. Moreover, for purposes of this appeal the Court must accept the jury's conclusion that Kerr-McGee's conduct was oppressive and/or malicious, and therefore that punitive damages were appropriate under the statute. That factual conclusion was not rejected by the Court of Appeals, and may not be relitigated in this Court.

Summary of Argument

A State law of general application authorizing punitive damages for malicious mishandling of highly toxic material does not conflict with the objectives of Congress. To the contrary, it parallels the Congressional purpose that the materials be handled with care. In addition, Congress has never said that a State punitive damage provision should be preempted, nor does the State law conflict with either

the Atomic Energy Act, 42 U.S.C. § 2011, *et seq.*, or the Price-Anderson Act, 42 U.S.C. § 2210. While nuclear plants are subject to extensive Federal regulation, and certain State regulations might be challenged on preemption grounds, State tort laws of general application—including punitive damage provisions—continue to govern. Moreover, the validity of punitive damages has been recognized in other fields subject to extensive Federal regulation. Punitive damages serve as additional compensation for victims of malicious wrongdoing, and therefore should not be treated differently from compensatory damages. In view of the above, and the strong presumption against finding a State law preempted, the decision below on punitive damages is incorrect.

ARGUMENT

The Oklahoma Punitive Damage Statute Does Not Conflict With Federal Law or Objectives, Nor Has Congress Expressed an Intent That Such a Law Be Preempted.

In *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), the Court said:

> we start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the *clear and manifest* purpose of Congress.

(Emphasis added). Justice Rehnquist explained the democratic underpinning of this principle as follows:

> This assumption derives from our basic constitutional division of legislative competence between the States

> and Congress; from "due regard for the presuppositions of our embracing federal system, *including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy* . . . ." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 243 (1959) (emphasis added).

City of Burbank v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 643 (1973) (dissent).

In the absence of a clear and manifest purpose of Congress to preempt, a State provision will not be preempted unless the Act of Congress "is in actual conflict with the law of the State," *Savage* v. *Jones*, 225 U.S. 501, 533 (1912), or unless the State provision "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

In the case at bar, Congress has not expressed a clear and manifest purpose to preempt a punitive damage statute of general application. To the contrary, it has expressed its intent of relying on State tort law for events such as occurred here, and has not excluded punitive damages. Moreover, the State statute is not in actual conflict with Federal law, and it does not stand as an obstacle to accomplishing the objectives of Congress. Indeed, the Federal scheme and State tort law of general application have compatible objectives—preventing NRC licensees from handling hazardous materials in an oppressive and malicious manner that can cause injury—and licensees that avoid such culpable conduct are not thereby violating Federal law.

A. There Is No Actual Conflict Between the State Punitive Damage Provision and the Objectives of Congress.

This is not a "square conflict" case where "compliance with both Federal and State regulations is a physical impossibility" or where there is an "inevitable collision between the two schemes." *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-43 (1963). To the contrary, Kerr-McGee can easily avoid punitive damages simply by handling plutonium in a manner that is not oppressive or malicious. NRC regulations, of course, do not mandate that Kerr-McGee be reckless in handling plutonium. To the contrary, those regulations require that defendant

> make every reasonable effort to maintain radiation exposures . . . *as low as is reasonably achievable* . . . .

10 CFR § 20.1(c). The award of punitive damages for recklessness in handling plutonium is entirely consistent with the NRC requirement.

Similarly, a central purpose of the Atomic Energy Act and NRC regulations is protection of the public health and safety from radiation hazards. 42 U.S.C. § 2012(e). Oklahoma's general punitive damage statute, as applied in particular cases, could parallel the safety purpose enunciated by Congress. The imposition of punitive damages in the extraordinary case of a company found to have handled a highly toxic, radioactive substance in a malicious manner so as to cause actual contamination to an individual is in complete harmony with the Congressional purpose of discouraging such reckless conduct.

Even if it be assumed that Congress wants to encourage the development of nuclear power, which *amici* do not concede,* Congress wants that only so long as there is protection of "the health and safety of the public." 42 U.S.C. § 2012(d). *See also* 42 U.S.C. § 2013(d) (development of atomic energy "to the maximum extent consistent with . . . the health and safety of the public"). Clearly, Congress did not want to encourage reckless handling of plutonium that would imperil public health, or to exempt from State law NRC licensees that engage in such reckless conduct. It should be very, very rare that such egregious conduct would occur; indeed, this is evidently the first case in which punitive damages have been awarded against an NRC licensee. One such award in over 25 years of commercial nuclear power can hardly be considered a serious threat to the multi-billion-dollar nuclear industry. It does no more than remind the industry that it must avoid outrageous conduct.

B. The Atomic Energy Act Does Not Bar Application of a Punitive Damage Provision for the Injury Suffered by Silkwood.

The Court of Appeals was incorrect in concluding that the regulations issued under the Atomic Energy Act preempt punitive damages. Nothing in that Act, or the NRC regulations, requires such preemption. It was acknowl-

* Many States have recently presented to this Court the argument that Congress does not wish to promote nuclear power over other forms of energy or over the conservation of energy, and has in fact deemphasized nuclear power in legislation over the past decade—giving greater emphases to coal, hydropower, solar and other forms of renewable energy, and conservation. See, *e.g.*, Brief *Amicus Curiae* of twelve States in Support of Jurisdictional Statement filed in this case on July 17, 1982, at 13-19. For purposes of brevity, that argument will not be repeated here.

edged below that compensatory damages could be awarded to Silkwood under State law, and there is no basis for excepting punitive damages.

Despite the absence of conflict between the objectives of the Federal and State laws, the Court of Appeals found preemption because of the novel reason that the punitive damage provision "competes substantially" with the NRC regulations. 667 F.2d at 923. This is not the test for preemption, however. See pp. 7-8, above. Moreover, the Oklahoma statute does not truly compete with NRC regulations, and is not a regulatory statute. The focus of the two laws is different. While the NRC regulations issued under the Atomic Energy Act require companies to exercise care to keep exposures "as low as is reasonably achievable" (see p. 9, above), they do not create a cause of action for victims if contamination does occur. Indeed, the Act does not create a private cause of action of any kind. *Susquehanna Valley Alliance* v. *Three Mile Island*, 619 F.2d 231, 237-9 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981). The State provision, by contrast, does not regulate conduct but does provide a remedy for victims of accidents.

The Court of Appeals' reliance on *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.* 405 U.S. 1035 (1972), is misplaced. That case held only that a State could not regulate the discharge of liquid effluents from an operating nuclear power plant because the NRC regulates that precise subject, and its regulations preempt. This Court's summary affirmance in that case is of very limited precedential value, because the issues were not fully briefed and argued. *See Edelman* v. *Jordan*,

415 U.S. 651, 670-71 (1974). Moreover, the summary affirmance did not indicate Court approval of the Circuit Court's reasoning. *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977). In any event, *Northern States* is easily distinguishable, because it barred only State *regulation* aimed specifically at nuclear plants, not tort rules of general application.

The Court of Appeals relied also on *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1 (1976). That case held that the NRC, rather than the U.S. Environmental Protection Agency, had power to set discharge limits for nuclear waste materials regulated by the NRC. Thus, the case dealt with regulation of operating nuclear facilities, rather than tort law of general application. Similarly, *United States* v. *City of New York*, 463 F. Supp. 604 (S.D.N.Y. 1978), struck down local regulation of a nuclear facility. These cases are not relevant here, since no State regulatory scheme is involved.

The Court of Appeals, however, said that a punitive damage award "is no less intrusive" than direct State regulation. 667 F.2d at 923. This is erroneous. State regulation would seek to control the day-to-day conduct of Kerr-McGee, and could duplicate NRC regulations. In addition, it could subject the company to State inspections and fines on a daily basis whether or not injury occurs, and whether or not the violation is due to recklessness rather than mere negligence. By contrast, the punitive damage award does not come into play until after someone is injured, and only if the injury is caused by oppressive or malicious misconduct. The award would deter only such outrageous conduct. Otherwise the punitive damage provision plays no role in the day-to-day operations of Kerr-McGee. Moreover, to

"regulate" an activity is to "prescribe the rule by which [the activity] shall be governed." *United States* v. *E.C. Knight Co.*, 156 U.S. 1, 12 (1895); *Accord, U.S.* v. *Darby*, 312 U.S. 100, 113 (1941). *See also Federal Power Comm.* v. *Corporation Comm. of State of Okla.*, 362 F. Supp. 522, 532 (W.D. Okla. 1973), *aff'd mem.* 415 U.S. 961 (1974) (to regulate is to "lay down the rule by which a thing shall be done"). By contrast, while a punitive damage award may seek to deter malicious wrongdoing, it does not prescribe rules of conduct.

An award of punitive damages, while it seeks to punish the defendant and deter wrongful conduct, has a strong compensatory effect as well. It compensates the plaintiff for the trouble, inconvenience and expense of litigation. Thus, punitive damages are a supplement to compensatory damages for cases of malicious wrongdoing. Many courts have held that punitive damages

> have an additional purpose in compensating the plaintiff for those additional elements of damage which were a consequence of the aggravated nature of the offense, or which are so intangible that they are not covered by the ordinary compensatory award, or which, although a normal consequence of the wrong, are not normally allowed as compensation because of policy reasons.
>
> Since the allowance for "costs" under the rules adopted in most American jurisdictions is commonly known to be highly inadequate to reimburse a successful party for the expenses of litigation, particularly since attorneys' fees are not usually allowed, it has been suggested from time to time that where punitive damages are awarded, a proper measure or element of such damages would be the litigation expenses, particu-

> larly attorneys' fees, which plaintiff incurred as a result of defendant's acts.

J. L. Litwin, "Attorneys' Fees Or Other Expenses Of Litigation As Elements In Measuring Exemplary Or Punitive Damages," 30 ALR 3d 1443, 1445-6 (footnotes omitted). That annotation identifies dozens of cases that permit plaintiff to recover litigation costs as part of punitive damages. *Id.* at 1448-1455, and pocket part at 246-7. As one Court has said, with respect to the amount of punitive damages:

> One factor mentioned by the Supreme Court, as a guide rather than a definition, is the provision of costs of litigation actually incurred but not included within costs taxable to the ordinary victor, Day v. Woodworth, *supra*, 54 U.S. at 371. The significant element of course is counsel fees.

Afro-American Publishing Co. v. *Jaffe*, 366 F. 2d 649, 662 (D.C. Cir. 1966) (*en banc*) (footnote omitted). *See also Payne* v. *Government of District of Columbia*, 559 F. 2d 809, 821-2 (D.C. Cir. 1977) (opinion of Circuit Judge Robinson) (punitive damages "may include counsel fees and other costs"). That punitive damages compensate plaintiff for costs of litigation and attorneys' fees has also been recognized in *Campus Sweater & Sportswear* v. *M.B. Kahn Const.*, 515 F. Supp. 64, 105 (D. S.C. 1979), *aff'd*, 644 F. 2d 877 (4th Cir. 1981), and *Wangen* v. *Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W. 2d 437, 454 (1980).

Punitive damages also compensate plaintiff for "the enormous diligence, imagination, and financial outlay required . . . to uncover and to prove the flagrant misconduct" by defendant. *Grimshaw* v. *Ford Motor Co.*, 119 Cal. App. 3d 757, 812, 174 Cal. Rptr. 348, 384 (1981).

In addition, punitive damages compensate plaintiff for the "humiliation, sense of outrage, and indignity . . . [and] the harm done the plaintiff's feelings." *Kewin* v. *Massachusetts Mutual Life Insurance Co.*, 295 N.W. 2d 50, 55 (Mich. Sup. Ct. 1980), citing *McFadden* v. *Tate*, 350 Mich. 84, 89, 85 N.W. 2d 181 (1957). As a commentator has said:

> Even today the law for various reasons does not fully protect emotional tranquillity through compensatory damages; requiring defendants guilty of flagrant misconduct to make full compensation for such injuries helps to fill this void. When one person is injured by the malicious actions of another, "the human spirit is bruised by the knowledge of another's ill-will or contempt . . . ." The legal revenge provided by punitive damages helps restore the plaintiff's emotional equilibrium and in this way compensates him for the psychological harm caused by the defendant's malicious act.

Owen, "Punitive Damages In Products Liability and Litigation," 74 Mich. L. Rev. 1258, 1296 (1976) (footnote omitted). Thus, punitive damages should not have been isolated by the Court below and treated differently from compensatory damages.

Moreover, punitive damages have been permitted in other fields subject to extensive Federal regulation, despite the claim of preemption. Thus, in *Nader* v. *Allegheny Airlines*, 426 U.S. 290 (1976), plaintiff was awarded $25,000 punitive damages in his common-law claim arising out of overbooking on an airline regulated by the Civil Aeronautics Board. CAB regulations covered the subject of overbooking, and defendant claimed that this regulation preempted the field. This Court rejected defendant's argu-

ment, upholding a presumption that State law rights are not abrogated by a subsequent Federal statute "unless it is found that the preexisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy, in other words, render it nugatory." *Id.* at 298, quoting with approval from *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907). The Court went on to say that "where Congress has sought to confer such power [to immunize from common law tort liability] it has done so expressly," 426 U.S. at 301. The Court refused to find preemption because "the common law action and the statute are not 'absolutely inconsistent' and may coexist," *id.* at 300, since "there is no [CAB] requirement that air carriers engage in overbooking." *Id.* Similarly, Silkwood's punitive damage recovery is not inconsistent with NRC regulations because the latter do not require Kerr-McGee to handle plutonium in a reckless manner.* *Accord, Hubbard* v. *Allied Van Lines, Inc.*, 540 F. 2d 1224, 1229 (4th Cir. 1976), upholding claim of punitive damages for malicious violation of Interstate Commerce Act nondiscrimination clause, 49 U.S.C. § 316(d), as "fully complementary to the congressional mandate and will help achieve compliance" with the Act.

That punitive damages may be awarded under State law despite Federal regulation is reflected as well in the field of

* While Nader's judgment for punitive damages was ultimately reversed, *Nader* v. *Allegheny Airlines, Inc.*, 626 F.2d 1031 (D.C. Cir. 1980), that is because the Court found there was no deceitful conduct by defendant. However, punitive damages were not preempted, and could have been awarded for malicious conduct. The issue of whether compliance with Federal regulations bars punitive damages was not considered by the Court below, and therefore is not before this Court. See above, p. 6.

labor law, where there is a perceived need for a national labor relations policy. In that field also this Court has preserved against preemption the application of traditional common-law remedies, including punitive damages, for tortious conduct. *See United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656 (1950) (upholding $100,000 punitive damage award on a State tort claim for what was also an unfair labor practice), where the Court said:

> To the extent . . . that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. . . . The primarily private nature of claims for damages under state law also distinguish them in a measure from the public nature of the regulation of future labor relations under federal law.

Id. at 665.

This preservation of State tort law despite the perceived desire for a uniform national labor policy is demonstrated by other cases as well. Thus, in *Farmer* v. *United Brotherhood of Carpenters*, 430 U.S. 290 (1977), this Court held that the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, did not preempt a State tort action by a union member, for compensatory and punitive damages, charging the union with intentional infliction of emotional stress through abuse and harassment. The Court recognized that the action complained of might constitute an unfair labor practice under the Act, but said that "there is no federal protection" for outrageous conduct by union officials. *Id.* at 302. The Court recognized that the State "has a substantial interest

in protecting its citizens from the kind of abuse of which [plaintiff] complained," *id.*, and noted that the National Labor Relations Board ("NLRB") could not award damages to plaintiff. *Id.* at 304. Similarly, in *Automobile Workers* v. *Russell*, 356 U.S. 634 (1958), the Court upheld the jurisdiction of a State court to award compensatory and punitive damages to an employee against a union for malicious interference with the employee's lawful occupation, by preventing him from crossing a picket line. The Court noted that the NLRB had some jurisdiction over the action and could award the plaintiff back pay but not other elements of his damages under State law. And in *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966), the Court held that a libel action could be maintained under State law for malicious or reckless statements made during a labor dispute, despite NLRB jurisdiction, because the victim of the libel could not obtain redress from the NLRB. *Id.* at 63-4.

It is noteworthy that these cases upheld the application of State tort remedies in their entirety, making no exception for punitive damages. In the case at bar, similarly, there is no basis for such an exception. And, as in the cited cases, application of State tort remedies to Silkwood was appropriate because Federal law does not protect reckless mishandling of plutonium by Kerr-McGee, and States have a substantial interest in protecting their residents from such conduct. In addition, the NRC was without jurisdiction to award damages to Silkwood.

These cases prove again that the existence of comprehensive Federal regulations does not in itself establish preemption of all State regulation, let alone of a punitive dam-

age statute. As this Court said in *New York Dept. of Social Services* v. *Dublino*, 413 U.S. 405 (1973):

> We reject, to begin with, the contention that preemption is to be inferred merely from the comprehensive character of the federal work incentive provisions. . . . The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem, cf. *Askew* v. *American Waterways*, 411 U.S. 325 (1973).

Id. at 415. *See also De Canas* v. *Bica*, 424 U.S. 351, 359-60 (1976) ("comprehensiveness . . . to be expected" in immigration law; no preemption).

C. The Price-Anderson Act Does Not Bar an Award of Punitive Damages for the Injury Suffered by Silkwood.

Although the Court of Appeals did not expressly hold that the Price-Anderson Act, 42 U.S.C. § 2210, barred punitive damages in this case, it suggested that perhaps that was the result. The Court acknowledged that the Act does not claim to preempt punitive damage provisions:

> . . . the Price-Anderson Act contemplates that state tort law applies in at least some cases involving nuclear incidents; we have found that a claim for compensatory damages for off-site contamination caused by the escape of plutonium is one such situation. Nowhere in the Price-Anderson Act or its legislative history have we found express mention of punitive damages. References in the Price-Anderson Act that state law may determine tort liability may be read to permit punitive

> as well as compensatory damages in states like Oklahoma which permit them.

667 F.2d at 922. Nonetheless, the Court did not then apply the presumption against preemption, or attempt to harmonize the Federal and State laws. Rather, it concluded that for an extraordinary nuclear occurrence ["ENO"]* the Act "implicitly assumes that only compensatory damages will be awarded," *id.*, relying on this Court's statement that the Act provides compensation to victims of catastrophic nuclear accidents. *See Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 93 (1978).

The Court's suggestion that Price-Anderson preempts is erroneous. First of all, the Silkwood incident was not an ENO, and therefore it is irrelevant whether punitive damages are permitted for an ENO. For an incident which is not an ENO, Price-Anderson requires the application of State tort law in its totality. NRC regulations under Price-Anderson say explicitly that ordinary State tort law governs a non-ENO, and that they govern even an ENO except that certain defenses are waived. The regulations provide:

> The presence or absence of an extraordinary nuclear occurrence determination does not concomitantly determine whether or not a particular claimant will recover on his claim. In effect, it is intended primarily to determine whether certain potential obstacles to recovery are to be removed from the route the claimant would ordinarily follow to seek compensation for his injury or damage. *If there has not been an extraordinary nuclear occurrence determination, the claimant*

* An ENO is an event which results in substantial release of radioactivity away from the plant site, causing substantial damage to persons or property offsite. See 10 CFR §§ 140.81-140.85.

> *must proceed (in the absence of settlement) with a tort action subject to whatever issues must be met and whatever defenses are available to the defendant, under the law applicable in the relevant jurisdiction.* If there has been an extraordinary nuclear occurrence determination, the claimant must still proceed (in the absence of settlement) with a tort action, but the claimant's burden is substantially eased by the elimination of certain issues which may be involved and certain defenses which may be available to the defendant . . .

10 CFR § 140.81(b)(4) (emphasis added).

The Court of Appeals acknowledged that State law generally governs the Silkwood claim. It said:

> For nuclear incidents below the level of an extraordinary nuclear occurrence, and the instant case is one, the rules of tort law of the state in which the injury occurred still apply.
>
> > "The bill has been drafted so that minor claims involving nuclear facilities or materials may remain subject to the traditional rules of tort law."
>
> S. Rep. No. 1605, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. Code Cong. & Ad. News 3201, 3211. *See also id.* 3203-04, 3206, 3207, 3209, 3226; S. Rep. No. 296, 85th Cong., 1st Sess. *reprinted in* [1957] U.S. Code Cong. & Ad. News 1803, 1810, 1823.

667 F.2d at 921. For the Court to say that punitive damages must be treated differently from the rest of State tort law was erroneous and unsupported. Neither Congress nor this Court has drawn such a distinction between elements of the State claim.

In fact, the Price-Anderson Act scrupulously avoids language that might suggest only claims for compensatory

damages are covered by its insurance, indemnity and liability limitation provisions. Rather the Act uses broad language that can encompass punitive damages within its scope, such as "public liability claims," 42 U.S.C. § 2210(a) and *passim;* "suits for damage," *id.* (d), (e), (l); and "action," *id.* (h), (n)(2). The failure of Congress to make an exception for punitive damages, coupled with the strong presumption against preempting State law, demonstrates that punitive damages are permitted—and surely so for an event that is not an ENO.

Legislative history of the Price-Anderson Act, including the 1966 amendment, confirms that State tort law governs. Thus, in discussing the original bill as enacted in 1957, the Senate and House reports said that one of the two basic principles underlying the legislation is adherence to State tort law so long as the $560 million indemnification is not exceeded:

> The basic principles underlying the bill are two:
>
> 1. Since the rights of third parties who are injured are established by State law, there is no interference with the State law until there is a likelihood that the damages exceed the amount of financial responsibility required together with the amount of the indemnity. At that point the Federal interference is limited to the prohibition of making payments through the State courts and to prorating the proceeds available.
>
> 2. • • •

S. Rep. 296, 85th Cong., 1st Sess. 9, H. Rep. 435, 85th Cong., 1st Sess. 9, reprinted in [1957] U.S. Code Cong. & Ad. News 1803, 1810.

In 1966, Congress amended the Price-Anderson Act to add § 2210(n), under which the operator of the nuclear

facility waives certain defenses in the event of an ENO. Pub. L. 89-645, ¶3. In enacting that provision, Congress specifically declined to enact a Federal substantive law to govern the claims, choosing to continue reliance upon State law—but barring defendants in case of an ENO from raising certain defenses otherwise available under State law. As the Senate Report said:

> Since its enactment by Congress in 1957 one of the cardinal attributes of the Price-Anderson Act has been its minimal interference with State law. Under the Price-Anderson system, the claimant's right to recover from the fund established by the act is left to the tort law of the various States; the only interference with State law is a potential one, in that the limitation of liability feature of the act would come into play in the exceedingly remote contingency of a nuclear incident giving rise to damages in excess of the amount of financial responsibility required together with the amount of the governmental indemnity.
>
> • • •
>
> . . . However, the committee does not believe it is necessary to go to the length of enacting substantive law—that is, a new body of Federal tort law to achieve these ends. Essentially the same result, it is believed, can be accomplished through a Federal statute authorizing the Atomic Energy Commission to require that participants in the nuclear industry waive certain key defenses to liability that might otherwise be permissible under applicable State or Federal law.
>
> • • •
>
> This approach to the problems discussed above is in keeping with the approach followed in enacting the original Price-Anderson Act—namely, interfering with State law to the minimum extent necessary. In essence,

> *the plan adopted permits the retention of State law with respect to the cause of action and the measure of damages,* but the requirements specified for the insurance contracts and indemnity agreements provide the uniform rules needed to accomplish the bill's objectives . . .

Sen. Rep. No. 1605, and H.R. Rep. No. 2043, 89th Cong., 2d Sess. 6, 9 (1966), reprinted in [1966] U.S. Code Cong. & Ad. News 3201, 3206, 3209 (emphasis added). Thus, the measure of damages available under State law—including punitive damages—would apply up to the limit of $560 million.

In addition, Congress clearly intended that for an event less severe than an ENO—such as the Silkwood injury—the entire array of State remedies would continue to be available:

> . . . the committee is of the opinion, on balance, that there is no pressing need to invoke the mechanisms and procedures of the special waivers in situations which are not exceptional and which can well be taken care of by the traditional system of tort law. Accordingly, in the absence of some extraordinary occurrence involving a nuclear facility or device or nuclear materials, traditional concepts should be allowed to prevail . . .

Sen. Rep. No. 1605, *supra,* and H.R. No. 2043, *supra,* 11, [1966] U.S. Code Cong. & Ad. News at 3211. Similarly, Representative Price explained this concept as follows:

> The definition of "extraordinary nuclear occurrence" has been drafted so that minor claims involving nuclear facilities will remain subject to *all the traditional rules of tort law.*

112 Cong. Rec. H. 14012 (1966) (emphasis added). Throughout the Congressional discussion there was no suggestion

that punitive damages were being excluded from the package of remedies available under State tort law. As the Solicitor General notes, the issue of punitive damages was put before Congress by Professor David Cavers, who raised the question of whether they should be allowed under Price-Anderson. Solicitor General's *amicus* brief with respect to the Jurisdictional Statement filed in November 1982, at 15-16 n. 19. The failure of Congress to exclude punitive damages indicates that they continue to be permitted where authorized under State law.

Finally, Price-Anderson cannot bar the punitive damage award here because the Act did not even apply to the Kerr-McGee plant at the time of the Silkwood contamination. As the Solicitor General says, the NRC did not extend the provisions of the Act to such plants "until after the events giving rise to this case." See Brief for the United States as *Amicus Curiae* filed in November 1982 opposing the Jurisdictional Statement at 15, n. 18.

Conclusion

This Court should make every effort to reconcile the Oklahoma and Federal provisions " 'rather than holding one completely ousted.' " *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U.S. 117, 127 (1973), quoting from *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963). Here, reconciliation of the two schemes is simple enough, as there is no conflict in the objectives of the statutes and no inconsistency in their terms.

The Court of Appeals' decision overturning the award of punitive damages on grounds of Federal preemption should be reversed.

Dated: April 1983

Respectfully submitted,

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No. 81-2159

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BILL M. SILKWOOD, ADMINISTRATOR OF THE ESTATE OF KAREN G. SILKWOOD, DECEASED,
Appellant,

v.

KERR-MCGEE CORPORATION AND KERR-MCGEE NUCLEAR CORPORATION,
Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE ATOMIC INDUSTRIAL FORUM, INC. AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

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QUESTIONS PRESENTED

1. Whether the award of punitive damages in this case for injury caused by a federally licensed plutonium processing facility is preempted by the Atomic Energy Act.

2. Whether the preemption of punitive damages violates due process or equal protection.

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BRIEF OF THE ATOMIC INDUSTRIAL FORUM, INC. AS *AMICUS CURIAE*

In accordance with this Court's Rule 36, Atomic Industrial Forum, Inc. ("AIF" or "the Forum") has received and filed with the Court the written consents of counsel for each of the parties to appear as *amicus curiae* in this proceeding. This brief is submitted in support of the position of Appellees Kerr-McGee Corporation and Kerr-McGee Nuclear Corporation (hereinafter referred to as "Appellees" or "Kerr-McGee").

INTEREST OF THE *AMICUS CURIAE*

The Forum is an association of about 550 domestic and overseas organizations interested in development of the peaceful uses of nuclear energy. Its members include electric utilities, manufacturers, architect-engineers, con-

sulting firms, mining and milling companies, and others, who design, build, operate, and service facilities for the production of nuclear fuel and the generation of nuclear power. Appellee Kerr-McGee Corporation is a member of the Forum. Members of the Forum are possible defendants in law suits that might be brought in the unlikely event of an incident at a nuclear plant. If the judgment of the Court of Appeals is reversed, normal operations of nuclear facilities in compliance with the pervasive federal regulatory program would become subject to tort actions that, as in this case, could result in judgments for millions of dollars in punitive damages. The spectre of such tort suits in which juries apply unfounded, unidentifiable, and changing standards for radiation exposures and releases would make private industry reluctant to remain involved in nuclear energy projects.

The Forum believes that the Court of Appeals was correct in its determination that the Atomic Energy Act preempts any award of punitive damages. Awards of such damages conflict with the comprehensive regulatory scheme created by the Act. Preemption of such damages does not violate equal protection or due process, contrary to the claim made by Appellant in his Jurisdictional Statement at 24-29, but apparently abandoned in his brief on the merits.

STATEMENT OF THE CASE

Karen Silkwood worked with plutonium as a laboratory analyst at the Cimarron plant of Kerr-McGee Nuclear Corporation, a subsidiary of Kerr-McGee Corporation, located near Crescent, Oklahoma.

The Cimarron plant was licensed by the Atomic Energy Commission[1] "to possess and use special nuclear

---

[1] The Atomic Energy Commission was abolished by the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801-5879 (1976 & Supp. V 1981). Its licensing and regulatory functions were transferred

material in a plutonium processing and fuel fabrication plant." *See* 10 C.F.R. § 70.21(a) (1983); Defendants' Exs. 1, 2. Subsequent to the events giving rise to this case, the plant was closed for economic reasons. While it was operating, it was subject to comprehensive regulation by the Commission, including inspections by representatives of the Commission's Regional Office. *See* J.A. 1511-24.[2]

Plutonium is a "special nuclear material" as that term is defined in 42 U.S.C. § 2014(aa) (1976). It is a man-made radioactive element, of atomic number 94, and of various atomic weights. The danger associated with plutonium is not its presence in small quantities on the skin or clothing, but rather its internal deposition, *i.e.*, by inhalation. The isotope of plutonium of concern in this case is plutonium-239. It is a fissionable material, which means that its nucleus may split in such a way as to support a chain reaction, during which energy is released.

In the course of her employment, Karen Silkwood was contaminated with plutonium at the Cimarron facility on November 5 and 6, 1974. As a result of that contamination, she was required to submit urine and fecal samples to the plant's laboratory for analysis. She was taking a urine sample in her apartment on November 7, 1974, when she spilled that sample in the bathroom. She was thereby contaminated, as was her apartment, with an additional dose of plutonium. It was stipulated by the parties that all the plutonium that contaminated Karen Silkwood came from the Cimarron facility. It was also stipulated that the urine sample she spilled was "spiked",

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to the Nuclear Regulatory Commission. 42 U.S.C. § 5841(f) (1976). For the sake of convenience, both agencies will be referred to as the "NRC" or "the Commission."

[2] As used herein, "J.A." refers to the Joint Appendix in the Court of Appeals for the Tenth Circuit, and "Tr." refers to the transcript of the proceedings in the trial court.

i.e., the plutonium contained in that sample did not pass through her body, but rather had been added by some other means.

The amount of plutonium in the Cimarron facility was at times substantial, but the amount involved in Silkwood's contamination was extremely small. The total amount of plutonium found in Karen Silkwood's apartment on November 7, 1974, was less than three ten-thousandths of a gram and the total amount found in her lungs was 81.5 nanograms or 81.5 billionths of a gram. J.A. 921-22. This corresponds to approximately 5 nanocuries or 5 billionths of a curie of plutonium-239.[3] Karen Silkwood had a total of 8.8 nanocuries of plutonium in her body after her contamination on November 7, 1974. She died in an automobile accident on November 13, 1974, 8 days after the first contamination incident. J.A. 1438-39.

The standards of the International Commission on Radiological Protection and the National Council on Radiation Protection, upon which the Commission's regulations are based, set the maximum permissible occupational body burden for plutonium at 40 nanocuries for the whole body and 16 nanocuries for the lung. *Id.*; Tr. 7080, 7146-47.

The jury awarded Appellant $10,505,000 in damages for the contamination incidents described above. *Silkwood v. Kerr-McGee Corp.*, 485 F. Supp. 566, 570 (W.D. Okla. 1979). The trial judge denied a motion for judgment *n.o.v.* *Id.* at 594. The jury's award of $5,000 for contamination of Karen Silkwood's apartment was affirmed by the Court of Appeals and is not before the

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[3] A curie is a unit used in measuring radioactivity. One curie equals the disintegration of 3.7×10^{10} nuclei per second and is equal to the radioactivity of one gram of radium-226. NUCLEAR ENERGY POWER STUDY GROUP, NUCLEAR POWER ISSUES AND CHOICES 408 (1977).

Court. *Silkwood v. Kerr-McGee Corp.*, 667 F.2d 908, 921 (10th Cir. 1981). The jury's award of $500,000 for the contamination of Karen Silkwood was reversed by the Court of Appeals on the ground that the Oklahoma workers' compensation statute provided the exclusive remedy for her claim, and that issue is not before the Court. *Id.* at 919-20. The only issue before the Court is the propriety of the jury's award of $10,000,000 in punitive damages, which the Court of Appeals held was preempted by the Atomic Energy Act.

SUMMARY OF ARGUMENT

The court below invalidated the award of punitive damages based on its conclusion that such state regulation was preempted by the Atomic Energy Act. *Silkwood*, 667 F.2d at 923. The holding of the court below should be affirmed because section 274 of the Atomic Energy Act, 42 U.S.C. § 2021 (1976 & Supp. V 1981), expressly preempts an award of punitive damages in this case, and because Congress intended to have the federal government occupy the field of regulation of radiation hazards for the protection of public health and safety.

First, section 274 expressly prohibits state regulation of special nuclear material, which includes plutonium, in a quantity sufficient to form a critical mass. Oklahoma is explicitly precluded from exercising any type of regulatory authority over Appellees since Appellees were licensed to use and possess at the Cimarron facility a quantity of plutonium sufficient to form a critical mass, as defined by the Commission's regulations. Because the purpose of an award of punitive damages is to punish egregious conduct and deter similar conduct by the actor or others in the future, it is a potent means of state regulation that must be preempted when applied to a subject matter explicitly reserved to the federal government.

Second, the award of punitive damages is impliedly preempted by the Atomic Energy Act, as interpreted in *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, 103 S. Ct. 1713 (1983). Since Congress has occupied the field of nuclear safety regulation, the award of punitive damages cannot be upheld if it in any way affects the subject matter reserved to the federal government. It is beyond doubt that the award of punitive damages in this case was addressed to nuclear safety and that such awards by definition are intended to have a regulatory effect. Since the award of punitive damages exerts state authority over a subject matter within the exclusive purview of the federal government, the award of punitive damages should be held to be preempted. The Price-Anderson Act, which was not triggered under the facts in this case, does not support Appellant's argument that the award of punitive damages is not preempted.

The question of whether the preemption of punitive damages violates due process or equal protection has not been briefed, because it appears that Appellant has abandoned this issue.

ARGUMENT

I.

THE AWARD OF PUNITIVE DAMAGES IN THIS CASE IS EXPRESSLY PREEMPTED BY THE ATOMIC ENERGY ACT.

Preemption of state law "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (citation omitted) (holding that the Federal Meat Inspection Act expressly prohibited labeling requirements in addition to those imposed under the Act). Since the punitive damage award in this case served as state regulation of radiation hazards for the protection of public health and safety, the award is expressly preempted by section 274 of the Atomic Energy Act. 42 U.S.C. § 2021 (1976 & Supp. V 1981).

Congress, in 1959, amended the Atomic Energy Act to clarify the responsibilities of the states and the Commission with respect to the regulation of byproduct, source, and special nuclear materials. 42 U.S.C. § 2021(a)(1) (1976). *See* S. REP. No. 870, 86 Cong., 1st Sess., *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2872, 2880-83. The amendment added section 274 to the Act, authorizing the Commission to enter into agreements with the states for the discontinuance of NRC's regulatory authority with respect to byproduct material, source material, and special nuclear material in quantities not sufficient to form a critical mass. 42 U.S.C. § 2021(b) (Supp. V 1981). Congress provided: "During the duration of such an agreement it is recognized that the State shall have authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards." *Id.* Thus, Congress authorized the Commission to return to the

states authority to regulate certain nuclear materials pursuant to such an agreement.[4]

Congress, however, expressly prohibited the Commission from discontinuing its regulatory authority over special nuclear materials in quantities sufficient to form a critical mass. 42 U.S.C. § 2021(b) (Supp. V 1981). Since Kerr-McGee's Cimarron plant was licensed by the Commission to possess a quantity of plutonium sufficient to form a critical mass,[5] the Act explicitly directs the Commission to continue regulation for the protection of public health and safety from radiation hazards. Moreover, Oklahoma has never entered into an agreement with the NRC for the transfer of regulatory authority. Oklahoma, therefore, is expressly preempted from imposing any form of regulation for protection of public health and safety from the special nuclear materials used at the Cimarron plant.

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[4] The purpose of this amendment to the Atomic Energy Act was to increase the role of the states in regulating nuclear power. Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 103 S. Ct. 1713, 1724 (1983). During hearings on the 1959 Amendment, however, the Commission indicated that "certain areas would be excluded [from state regulation] because the technical safety considerations are of such complexity that it is not likely that any state would be prepared to deal with them . . . ." *Federal-State Relationships in the Atomic Energy Field: Hearings Before the Joint Comm. on Atomic Energy*, 86th Cong., 1st Sess. 294 (1959) (letter of A.R. Luedecke, General Manager, Atomic Energy Commission).

[5] Special nuclear material is defined to include plutonium. 42 U.S.C. § 2014(aa) (1976). For purposes of § 274, the Commission has determined that for plutonium a quantity exceeding 200 grams is sufficient to form a critical mass. 10 C.F.R. § 150.11(a) (1983). To determine whether the license is governed by the regulations of an agreement state, the licensee must include the total quantity of special nuclear material that it is authorized to receive, possess, or use at the plant at any one time. 10 C.F.R. § 150.11(b) (1983). Kerr-McGee was licensed to use and possess 360 kilograms of plutonium at its Cimarron facility under License No. SNM-1174. Defendants' Ex. 2.

The award of punitive damages is an attempt to regulate plutonium and its use for the protection of public health and safety. Punitive damages by definition are not intended to compensate the injured party, but to punish the wrongdoer and deter him and others from similar egregious conduct in the future. *Smith v. Wade*, 103 S. Ct. 1625, 1639 (1983); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). *See* W. PROSSER, LAW OF TORTS 9-10 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 908 (1977). The Oklahoma Supreme Court has recognized that an award of punitive damages is permitted "because as a matter of policy the punishment of the transgressor may serve as an example to the rest of society that conduct of a similar kind will not be allowed." *Nixon v. Oklahoma City*, 555 P.2d 1283, 1285 (Okla. 1976).*

In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959), this Court invalidated a compensatory damage award issued under state tort law because it indirectly regulated conduct in an area under the exclusive control of the federal government. Moreover, the Court explicitly rejected the argument that an award of damages was not a form of state regulation: "Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." *Id.* at 247.

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* *Amici* in support of Appellant contend that the award of punitive damages should not be preempted because of its "strong compensatory effect." Brief *Amicus Curiae* of Arizona, Connecticut, Hawaii, *et al.* at 13-15. Contrary to this claim, it is well established that the *raison d'etre* for punitive damages is to punish the wrongdoer and deter future egregious conduct. *Smith*, 103 S. Ct. at 1639; *City of Newport*, 453 U.S. at 266-67; *Nixon*, 555 P.2d at 1285; RESTATEMENT (SECOND) OF TORTS § 980 (1977). Notwithstanding the claim of *Amici*, it is the regulatory effect of the award of punitive damages on nuclear safety and protection of public health from radiation hazards that is critical to the preemption analysis in the case at bar.

The Court acknowledged that state regulation can be as effectively enforced through an award of damages as through some form of injunctive relief. *Id.*

It is well settled that a state court may not enjoin conduct expressly permitted by federal law. This Court has long recognized that, if a state court injunction is barred by federal law, so is an award of damages for the same conduct. *Barrows v. Jackson*, 346 U.S. 249, 253-54 (1953).

In the instant case, the award of punitive damages has in effect regulated a subject matter that is expressly within the exclusive control of the federal government. If preemption is not found, state courts will be permitted to impose unfounded and changing standards for exposure to, and release of, radiation on the nuclear industry. As the Court found in *Garmon*, such awards would become a potent, but impermissible, regulatory tool. Such authority to regulate nuclear safety and radiation hazards, however, expressly remains with the NRC and not with the states. This Court should hold that section 274 of the Atomic Energy Act, 42 U.S.C. § 2021 (1976 & Supp. V 1981), expressly preempts the award of punitive damages in this case.

II.

THE AWARD OF PUNITIVE DAMAGES IN THIS CASE IS IMPLIEDLY PREEMPTED BY THE ATOMIC ENERGY ACT.

The award of punitive damages is also impliedly preempted by the Atomic Energy Act. The Court has recognized two types of implied preemption, subject matter preemption and actual conflict preemption. Subject matter preemption will be found when it is demonstrated that Congress intended to occupy the entire field, thereby making concurrent state regulation invalid. *See Pacific Gas and Electric*, 103 S. Ct. at 1726; *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 102 S. Ct. 3014, 3022 (1982); *Rice v. Santa Fe Elevator Corp.*, 331

U.S. 218, 230 (1947). Subject matter preemption can be implied by Congress in several ways:

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.

Rice, 331 U.S. at 230 (citations omitted). Actual conflict preemption will be found when it is demonstrated that Congress has not intended to preempt an entire subject matter, but state law actually conflicts with federal law. When conflict preemption is invoked, state law is nullified only to the extent it actually conflicts with federal law. *See Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). Such a conflict arises either when "compliance with both federal and state regulations is a physical impossibility," *id.*, or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (footnote omitted).

Subject matter preemption is much broader than conflict preemption since state law is nullified in its entirety if it in any way regulates the preempted subject matter. *Rice*, 331 U.S. at 236. *See Pacific Gas and Electric*, 103 S. Ct. at 1726-27; Note, *Implied Preemption of Punitive Damages for Nuclear Accidents*, 29 AM. U. L. REV. 741, 750 (1980).

Since the federal government has occupied the field of nuclear safety regulation, states should not be permitted to regulate radiation hazards for the protection of public health and safety. In this case, the award of punitive damages in effect imposes regulation on a subject matter preempted by the Atomic Energy Act.

A. Congress Has Impliedly Preempted Any State Regulation of Nuclear Safety and Radiation Hazards.

In *Pacific Gas and Electric Co.*, 103 S. Ct. 1713, 1726 (1983), this Court determined that any state regulation of radiation hazards for the protection of public health and safety is impliedly preempted by the Atomic Energy Act. The Act and its amendments have erected a dual scheme of nuclear regulation: "[T]he federal government maintains complete control of the safety and 'nuclear' aspects of energy generation; the states exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like." *Id.* (footnote omitted).

In *Pacific Gas and Electric*, the Court specifically rejected the argument that the states could impose safety regulation on nuclear facilities:

> State safety regulation is not preempted only when it conflicts with federal law. Rather, the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states. When the federal government completely occupies a given field or an identifiable portion of it, as it has done here, the test of preemption is whether "the matter on which the state asserts the right to act is in any way regulated by the federal government."

Id. (footnote omitted), *quoting Rice*, 331 U.S. at 236. Any state regulation of nuclear safety, therefore, is impliedly preempted since Congress intended for the federal government to regulate this entire subject matter.[7]

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[7] State regulation is permitted in specific areas expressly delineated by Congress. The Act provides the states with the opportunity to enter into agreements with the NRC under which the Commission discontinues its authority to regulate small quantities of nuclear materials. 42 U.S.C. § 2021(b) (Supp. V 1981). In addition, Congress explicitly authorized the states in the Clean Air Act Amend-

Under the test enunciated in *Pacific Gas and Electric*, any direct or indirect state regulation of radiation hazards for the protection of public health and safety is impliedly preempted by the Atomic Energy Act. Thus, the critical issue is whether the award of punitive damages in this case directly or indirectly regulates the subject matter under the exclusive control of the federal government.[8]

B. Punitive Damages Were Used in This Case to Regulate Nuclear Safety and Radiation Hazards.

The award of punitive damages in this case was used as a means to regulate nuclear safety and radiation hazards. If this Court fails to hold that this award is preempted, the states will have secured a means by which they can impose safety standards and regulations on the nuclear industry.

Punitive damages by definition are not intended to compensate an injured party in a tort case, but to punish

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ments of 1977 to regulate radioactive air pollutants released from nuclear plants. 42 U.S.C. § 7422 (Supp. V 1981). States also may impose certain siting and land use requirements for nuclear plants. NRC Authorization Act of 1980, Pub. L. No. 96-295, 94 Stat. 780 (1980).

[8] *Amici* in support of Appellant contend that the Court of Appeals enunciated a new test for preemption when it held "invalid any state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material." *Silkwood*, 667 F.2d at 923. *See* Brief of the National Women's Health Network as *Amicus Curiae* at 17; Brief *Amicus Curiae* of Arizona, Connecticut, Hawaii, *et al.* at 11. Although the Court of Appeals did not elaborately describe its test for preemption, it is beyond peradventure that the court used the theory of subject matter preemption to invalidate the award of punitive damages. The court relied on Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972), for its finding that Congress intended the federal government to occupy the entire field of regulating nuclear safety and protecting public health from radiation hazards. *Silkwood*, 667 F.2d at 922-23.

the wrongdoer and to deter him and others from similar egregious conduct in the future. *Supra* at 9. Indeed, punitive damages have been characterized as "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), *quoted in International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979). *See Scott v. Donald*, 165 U.S. 58, 86-87 (1897). In *Nixon v. Oklahoma City*, 555 P.2d 1283, 1285 (Okla. 1976) (citation omitted), the Oklahoma Supreme Court explained that punitive damages are awarded to the injured party "not because his position is meritorious but because society is benefited by deterring similar conduct. If no social benefit is to be derived from the imposition of exemplary damages, all legal justification for the award collapses." *See supra* note 6.

In *Garmon*, 359 U.S. at 246-47, the Court explicitly rejected the argument that an award of compensatory damages was not a form of state regulation:

> Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate. Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

Thus, the Court emphasized that the proper focus of a subject matter preemption inquiry is upon the areas of conduct affected by the state's action, not the form this action takes. The Court acknowledged that in particular

situations an award of damages or even an injunction might in fact not conflict with federal authority, but "[t]o sanction either involves a conflict with federal policy in that it involves allowing two law-making sources to govern." *Id.* at 247. Regardless of the type, "remedies form an ingredient of any integrated scheme of regulation . . . ." *Id.* Since punitive damages have an even greater deterrent and regulatory effect than compensatory damages, the Court should find them to be preempted by the Atomic Energy Act.

In the Atomic Energy Act, Congress authorized the Commission to establish "standards and instructions to govern the possession and use of special nuclear material . . . as the Commission may deem necessary or desirable . . . to protect health or to minimize danger to life or property." 42 U.S.C. § 2201(b) (1976). Pursuant to its statutory authority, the NRC has promulgated detailed regulations governing nuclear power, 10 C.F.R. Parts 0-170 (1983), including requirements for protection against radiation hazards that plants like Kerr-McGee's Cimarron plant must observe. 10 C.F.R. Part 20 (1983). Specific exposure and release limits are set forth in 10 C.F.R. Part 20 and Appendix B thereto.

Violations of the Atomic Energy Act or the Commission's regulations are subject to both civil and criminal penalties. 42 U.S.C. §§ 2271-84 (1976 & Supp. V 1981). *See, e.g.*, 10 C.F.R § 20.601 (1983). Specifically, for any violation of its licenses, Kerr-McGee was subject to civil penalties imposed by the Commission. 42 U.S.C. § 2282 (1976 & Supp. V 1981). For each violation, the Commission may impose a fine not to exceed $100,000, but if the violation is of a continuing nature, each day constitutes a separate violation. *Id.* Congress also provided for criminal sanctions, including substantial fines and imprisonment, for willful violations of various provisions of the Act. 42 U.S.C. §§ 2272-79, 2283-84 (1976 & Supp. V 1981). The Attorney General is authorized to

seek injunctive relief when the Commission determines that someone is violating or about to violate any provision of the Act or any regulation issued pursuant to the Act. 42 U.S.C. § 2280 (1976). Finally, the NRC may initiate proceedings to modify or revoke any license issued under the Act for violation of, or failure to observe, any of the provisions of the Act or of any regulation of the Commission. 42 U.S.C. §§ 2236-37 (1976). Indeed, when public health and safety are in imminent danger, the Commission may immediately recapture any special nuclear material or enter and operate the facility prior to any of the required proceedings. 42 U.S.C. §§ 2236(c) (1976).

The award of punitive damages disregards the Commission's elaborate regulations and standards and in their place imposes an unquantifiable and previously unknown standard arrived at by a jury of laymen. The trial court instructed the jury to weigh the Commission's standards for exposure to radiation as they would any expert testimony:

> You are instructed, however, that you are not bound by these standards. Your duty is to determine what constitutes the exercise of reasonable care in handling plutonium, or the existence of reckless and wanton conduct, in light of the physical characteristics of that material and the risks associated with it.

485 F. Supp. at 598. Thus, the jury was permitted to replace the NRC standards with its own standards for exposure to plutonium.[9] Under the test for preemption enunciated in *Pacific Gas and Electric*, 103 S. Ct. at 1726, Oklahoma is asserting its right to pass judgment upon conduct exclusively regulated by the federal government.

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[9] The trial court further instructed the jury that compliance with Commission regulations "would not necessarily preclude a finding of blameworthy conduct under all the facts and circumstances shown by the evidence." 485 F. Supp. at 598.

If Oklahoma had investigated the incident in question and imposed a civil fine of $10 million, or if a state court had enjoined further operation of a licensee's facility because of exposure to, or release of, nuclear material, there is no doubt that either action would be be preempted. By upholding the award of punitive damages, the trial court permitted the state to accomplish regulation of radiation hazards and nuclear safety though this regulation would be invalid if the state had employed different means.

C. The Price-Anderson Act, Which Is Part Of The Atomic Energy Act, Does Not Permit An Award Of Punitive Damages.

Based on the legislative history of the original Price-Anderson legislation and the 1966 amendment thereto, Appellant contends that Congress did not intend to preempt awards of punitive damages under state tort law, such as the award at issue herein. Brief of Appellant at 24-27, 29-41. Contrary to Appellant's position, Congress by enacting, amending, and reauthorizing the Price-Anderson Act did not intend to save an award of punitive damages under state tort law from federal preemption. Appellant's argument ignores section 274 of the Atomic Energy Act, 42 U.S.C. § 2021 (1976 & Supp. V 1981), this Court's reading of the congressional intent underlying the Atomic Energy Act in *Pacific Gas and Electric*, and the purposes of the Price-Anderson Act.

Appellant mistakenly attempts to separate the Price-Anderson provisions from the remainder of the Atomic Energy Act and specifically ignores section 274. Section 274, which was added to the Act in 1959 to "clarify the respective responsibilities . . . of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials," 42 U.S.C. § 2021 (a)(1) (1976), must be read with the Price-Anderson Act in addressing the preemption of the punitive damages

award in question. *See* S. REP. No. 870, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2872, 2880-83. Section 274(b) authorizes the Commission to enter into agreements with the states under which the NRC will discontinue its regulatory authority with respect to byproduct materials, source materials, and special nuclear materials in quantities not sufficient to form a critical mass. 42 U.S.C. § 2021(b) (Supp. V 1981).

In adopting the 1966 amendments to the Price-Anderson Act, Congress did not provide the states with authority to regulate radiation hazards for protection of public health and safety. Only pursuant to a section 274 agreement can a state regulate nuclear safety, and then its authority is confined to small amounts of nuclear materials. *See supra* at 7-8.

Appellant's position is further undermined by this Court's holding in *Pacific Gas and Electric*, 103 S. Ct. at 1726 & n. 25, that the federal government has completely occupied the field of nuclear safety regulation, except where limited powers are "expressly ceded to the states." *See supra* note 7. Contrary to Appellant's argument, the Price-Anderson Act simply does not contain an explicit provision that authorizes states to regulate radiation hazards for the protection of public health and safety through any means, including an award of punitive damages.

Furthermore, Congress intended the Price-Anderson compensation scheme to be triggered only after a catastrophic nuclear accident. *See* S. REP. No. 1605, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS, 3201, 3206, 3209; S. REP. No. 650, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 3209, 3212. The liability limitation, indemnification, and waiver of defenses provisions of the Price-Anderson Act are inapplicable unless the NRC determines that an extraordinary nuclear occurrence ("ENO") has taken

place.[10] 42 U.S.C. §§ 2210(c)-(e), (m)-(o) (1976); 10 C.F.R. § 140.81 (1983).

In this case, these Price-Anderson provisions are inapplicable because no ENO occurred throughout Karen Silkwood's exposure to plutonium. As we have shown, *supra* at 4, Karen Silkwood did not receive plutonium exposure in excess of the limitations specified by the NRC in 10 C.F.R. Part 20 and Appendix B thereto. For the NRC to determine that an ENO has occurred, a discharge or dispersal of radioactive material would have to exceed "by some significant multiple the appropriate regulatory limit." 10 C.F.R. § 140.81(b)(1) (1983). The Commission has stated that the Price-Anderson compensation scheme would not be triggered by a release slightly in excess of a regulatory limit. *Id. A fortiori*, where exposure does not exceed the appropriate regulatory limits, the liability limitation, indemnification, and waiver of defenses provisions of the Price-Anderson Act do not apply and cannot be relied on by Appellant to avoid preemption of punitive damages.

Finally, the award of punitive damages in this case defeats the purpose for which the Price-Anderson Act was enacted. Congress added the Price-Anderson scheme to the Atomic Energy Act "to protect the public by assuring the availability of funds for the payment of claims arising from a catastrophic nuclear incident" and "to remove a deterrent to private industrial participation in the atomic energy program posed by the threat of tremendous potential liability claims." S. REP. No. 1605, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS

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[10] The NRC's interpretation of the Atomic Energy Act is entitled to significant deference. Power Reactor Dev. Co. v. Int'l Union of Elec. Workers, 367 U.S. 396, 408-09 (1961); *see* Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 51 U.S.L.W. 4678, 4682 (U.S. June 6, 1983); Northern Ind. Pub. Serv. Co. v. Porter County Chapter of the Izaak Walton League of America, Inc., 423 U.S. 12, 14-15 (1975) (*per curiam*).

3201, 3206; S. REP. No. 650, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 3209, 3212.

The funds made available under the Price-Anderson scheme are intended for the "rapid and adequate financial compensation" of those injured in a catastrophic nuclear accident. S. REP. No. 650, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. CODE CONG. & AD. NEWS 3209, 3220. Since the amount of money available for victim compensation, though large, is nevertheless limited, awards of punitive damages could inordinately deplete the fund and thereby preclude full compensation of all injured parties. Such a result would be contrary to the congressional intent underlying the Price-Anderson Act.

Furthermore, awards of punitive damages should not be upheld based on a statute that attempts to limit the nuclear industry's liability and strives to promote private participation in the nuclear field. Private industry will be reluctant to remain involved in nuclear energy if it will be subject to unpredictable jury awards of punitive damages in addition to NRC fines. Without a holding of preemption in this case, the industry will find itself subject to tort suits in which juries may apply unfounded, unidentifiable, and changing standards for radiation exposures and releases.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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No. 81-2159

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

BILL M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, Deceased,

Appellant,

v.

KERR-MCGEE CORPORATION, a Delaware Corporation and KERR-MCGEE NUCLEAR CORPORATION, a Delaware Corporation,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE STATE OF MINNESOTA AS AMICUS CURIAE

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

BILL M. SILKWOOD, Administrator of the Estate of Karen G. Silkwood, Deceased,

Appellant,

v.

KERR-MCGEE CORPORATION, a Delaware Corporation and KERR-MCGEE NUCLEAR CORPORATION, a Delaware Corporation,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE STATE OF MINNESOTA AS AMICUS CURIAE

I. STATEMENT OF INTEREST OF MINNESOTA

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, the State of Minnesota (hereinafter "Minnesota") by its Attorney General hereby files its brief as amicus curiae in the above-entitled matter.

Minnesota has an interest in the preemption issue raised in this litigation by the holding of the United States Court of Appeals for the Tenth Circuit that Oklahoma's punitive damages statute is preempted by federal congressional action and therefore unconstitutional under the Supremacy Clause of the United States Constitution.

Minnesota's interest arises from the fact that it has a statute which allows Minnesota courts to award punitive damages in civil actions where the court has found that the defendant's acts show a willful indifference to the rights or safety of others. Minn. Stat. §549.20, subd. 1 (1980) provides:

> Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show a willful indifference to the rights or safety of others.

Subdivision 3 of the statute sets forth the factors to be considered by the court in such an award. That subdivision states:

> Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

Minnesota's statute was enacted in 1978. It sets forth standards for the award of punitive damages which parallel those of the common law. Minnesota-Iowa Television Company v. Watonwan T.V. Improvement

Association, 294 N.W.2d 297, 311 (Minn. 1980). It has been held that this statute does not apply to contract actions (id.), but it presumably applies to all tort actions.

The court of appeals' extremely broad interpretation of the doctrine of preemption, if upheld by this Court, would create a precedent which would have a negative impact upon Minnesota if in the future a challenge were brought against Minn. Stat. §549.20 (1980) in a case where the tort involves a radiation injury rather than any other type of injury. Thus, Minnesota has an interest in the precedent this Court's decision in this case may establish with respect to the validity of Minn. Stat. §549.20 as applied in certain tort cases.

Minnesota also has an historical interest in the issue of preemption of state

laws as they relate to nuclear power. Minnesota was a party in the case of Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972), upon which the court of appeals relied in striking down the application of Oklahoma's punitive damages in this case. Minnesota's concern with nuclear power dates back to the late 1960's and has continued up to the present.

II. STATEMENT OF THE CASE

The statement of the case which follows sets forth only those facts which are relevant to the issue addressed by Minnesota in the remainder of this brief.

Plaintiff Bill M. Silkwood brought suit in federal district court against Kerr-McGee Corporation and Kerr-McGee Nuclear Corporation on behalf of the estate of Karen G. Silkwood for damages caused through exposure to radiation suffered by

the decedent as a consequence of plutonium escaping a nuclear fuel processing plant operated by defendants. Following the jury trial, the district court awarded to plaintiff actual damages in the amount of $505,000. Pursuant to 23 Okla. Stat. §9 (1971), the district court also awarded punitive damages in the amount of $10,000,000. 1/

On appeal the Court of Appeals for the Tenth Circuit reversed the district court on its award of punitive damages. Silkwood v. Kerr-McGee Corp., 667 F.2d 908 (10th Cir. 1981). The court examined the language and the legislative history of the Price-Anderson Act, 71 Stat. 576 (codified in scattered sections of 42 U.S.C.) and concluded that, for nuclear incidents below

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1/ The opinion of the district court denying defendant's post-trial motions is reported in Silkwood v. Kerr-McGee Corp., 485 F.Supp. 566 (W.D. Okla. 1979).

the level of an extraordinary nuclear occurrence, Congress intended that the rules of tort law of the state in which the injury occurred still apply. 667 F.2d at 921. The court, however, found no express mention of punitive damages in the Price-Anderson Act or its legislative history. The court stated:

> References in the Price-Anderson Act that state law may determine tort liability may be read to permit punitive as well as compensatory damages in states like Oklahoma which permit them.

667 F.2d at 922. The court also found, however, that the Act implicitly assumes that for extraordinary nuclear occurrences, only compensatory damages will be awarded. Id. The court apparently found the result in this case unclear under the Act because it made no conclusion as to whether the Act did or did not allow punitive damages to be awarded under state tort law.

The court resolved the doubt created by the Price-Anderson Act by construing the Atomic Energy Act of 1954, 42 U.S.C. §§2011 et seq., particularly section 2021, as preempting a judicial award of punitive damages under state law as punishment for bad practices or to deter future practices involving exposure to radiation. The court stated:

> We cannot read that case [Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972)] and Train [Train v. Colorado Public Interest Research Group, 426 U.S. 1 (1976)] other than as requiring us to hold invalid any state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material.

667 F.2d at 923. The court found the punitive damages award to be "no less intrusive than direct legislative acts of the state." It held 23 Okla. §9 (1971) to be preempted as applied to radiation injuries.

The appellants seek the Court's review of this case and reversal of the Tenth Circuit's holding that Oklahoma's punitive damages is preempted under the Supremacy Clause of the United States Constitution.

IV. SUMMARY OF ARGUMENT

A state's interest in fashioning its own tort remedies is paramount to any federal interest unless there is a conflict with federal law. State punitive damages statutes as applied to tort actions involving radiation injuries do not conflict with federal law and are therefore not preempted as applied to such tort actions.

V. ARGUMENT

STATE PUNITIVE DAMAGES LAWS ARE NOT FEDERALLY PREEMPTED AS APPLIED TO TORT ACTIONS BROUGHT FOR RADIATION INJURIES

The creation of remedies for tort actions is a traditional state power. This Court has recently recognized that a state's interest in fashioning its own

tort laws is paramount to any federal interest unless there is a conflict with federal law. In Martinez v. California, 444 U.S. 277 (1980) the Court upheld against constitutional attack a California statute which provided an immunity defense to potential state tort law liability, stating:

> Even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any federal interest, except perhaps an interest in protecting the individual from state action that is wholly arbitrary or irrational.

444 U.S. at 282. The court noted, however, that "when state law creates a cause of action, the State is free to define the defenses to that claim, . . . unless, of course, the state rule is in conflict with federal law." Id., n.5, quoting Ferri v. Ackerman, 444 U.S. 193, 198 (1979).

Punitive damages laws of Oklahoma and other states do not conflict with federal

law and are therefore valid. The court of appeals applied an incorrect standard to invalidate the Oklahoma statute. Therefore this Court should reverse the decision below.

A. There is No Conflict Between Federal Law and the Application of State Punitive Damages Law to a Case Involving Radiation Injury.

This Court has in the past faced the question as to what constitutes a conflict between federal and state law. The conflict may either be created by express language in the federal law or may arise by implication. See Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978).

In cases where there is no express language in the federal law the Court has used two tests to identify conflicts. In Florida Lime and Avocado Growers v. Paul, 373 U.S. 132, 142-43 (1963) the Court stated that a conflict will be found "where

compliance with both federal and state regulations is a physical impossibility." A conflict will similarly be found where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). However, there is a strong presumption in favor of upholding the validity of the state law. Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978). Courts should not seek out conflicts where they do not clearly exist. Huron v. Portland Cement Co. v. City of Detroit, 362 U.S. 440, 446 (1960).

The two bodies of law with which a state punitive damages statute could conceivably conflict are the Price-Anderson Act, 71 Stat. 576 (codified in scattered sections of 42 U.S.C.) and the Atomic Energy Act, 42 U.S.C. §§2011 et seq. The Oklahoma statute conflicts with neither of these.

As previously discussed at 6-7, the court of appeals concedes that for nuclear injuries below the level of an extraordinary nuclear occurrence the Price-Anderson Act provides that state tort rules apply. The court of appeals also concedes that references in the Act itself may be read to permit punitive damages as well as compensatory damages. Therefore there is clearly no conflict between the Price-Anderson Act and state punitive damages statute.

The Atomic Energy Act, 42 U.S.C. §2011 et seq., contains no express language under which state punitive damages laws conflict because the Act contains no provision for awards of damages to private individuals, either compensatory or punitive. See Marshall v. Consumers Power Co., 65 Mich. App. 237, 237 N.W. 2d 266 (1975). The Act and its legislative history contain no

evidence of a direct intention of Congress to preempt any part of state tort law with respect to radiation injuries.

State punitive damages laws also fail to conflict with federal law because they do not create a situation where compliance with both federal and state law is a physical impossibility. Further, such laws do not stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress.

Compliance with federal law by a person handling radioactive materials is clearly possible without automatically creating liability under a state punitive damages law. In Minnesota, for example, punitive damages may only be awarded where there is "clear and convincing evidence that the acts of the defendant show a willful indifference to the rights of others." Minn. Stat. §549.20 (1980). The Oklahoma

law in question permits the award of punitive damages where fraud, oppression, gross negligence or malice are present or where there is a reckless, willful or wanton disregard for the rights of others. See, e.g., White B. K. Trucking Co., Inc., 405 F.Supp. 1068-69 (W.D. Okla. 1975). There could be no conflict with the Atomic Energy Act and the regulations promulgated thereunder unless it could be shown that Congress intended to compel persons handling radioactive materials to do so in a manner showing a willful or wanton indifference to the rights of others or in a manner that is fraudulent, oppressive, grossly negligent, malicious or reckless. Not even the most enthusiastic proponents of nuclear power would dare to make a claim that such a result is intended by Congress.

The imposition of liability for punitive damages on a defendant who meets

the standards described above does not stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. The Atomic Energy Act sets up the structure under which private industry may possess and use radioactive materials, but it does not evidence an intent that private industry should be allowed to handle those materials so as to inflict intentional or reckless injury. As stated by the district court which awarded punitive damages in the instant case:

> Surely defendants would not argue that punitive damages would be inappropriate if a nuclear licensee knew of the time and manner of the plutonium's escape, but did nothing to prevent it because the regulations did not require it. Similarly, if a licensee were aware of defects within its facility that would render likely repeated exposures of employees to plutonium, but did nothing to correct it, . . . punitive damages might be considered regardless whether government regulations required those changes to be made.

Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566, 584 (W.D. Okla. 1979).

An important part of the mission of the Nuclear Regulatory Commission is to protect the health and safety of the public. 42 U.S.C. §2012(d) provides:

> The processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest in order to provide for the common defense and security and to protect the health and safety of the public.

(Emphasis supplied.) The imposition of penalties to punish a licensee for intentional or reckless infliction of injury does not frustrate the intent of Congress but rather is in furtherance of the same goal. Therefore state punitive damages statutes do not conflict with federal regulation.

B. The Court of Appeals Erred in Finding the Oklahoma Statute to be Preempted on the Grounds that it "Substantially Competes With" and "Intrudes Upon" Federal Regulation.

In striking down the Oklahoma punitive damages statute as applied to radiation

injury the court of appeals applied the wrong standard. The court did not specifically find that the Oklahoma punitive damages law conflicted with federal law. Rather, the court found that the Oklahoma law "substantially competes with" federal law. 667 F.2d at 923. The court found that awarding damages to punish bad practices and deter future bad practices "intrudes upon" the Nuclear Regulatory Commission's regulatory functions under the Atomic Energy Act, 42 U.S.C. §§2011 et seq.

The court of appeals has failed to recognize the state's paramount interest in fashioning its own tort remedies and has struck down a state tort law on grounds that are inconsistent with the test enunciated in Martinez v. California, supra, which requires that there be a conflict between the federal law and the state law before the state law falls. Since the court could not

find an actual conflict between the Oklahoma statute and federal law, it was obliged to uphold its validity. Therefore the court of appeals' decision should be reversed.

V. CONCLUSION

Based on the foregoing, the State of Minnesota by its Attorney General respectfully requests the Court to reverse the holding of the United States Court of Appeals for the Tenth Circuit declaring Oklahoma's punitive damages statute preempted by federal law as applied to radiation injuries.

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APR 27

No. 81-2159

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

BILL M. SILKWOOD, Administrator of the Estate of KAREN G. SILKWOOD, Deceased,
Appellant,

v.

KERR-McGEE CORPORATION and KERR-McGEE NUCLEAR CORPORATION,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL WOMEN'S HEALTH NETWORK AS AMICUS CURIAE

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April 27, 1983

QUESTION PRESENTED

Whether the federal Atomic Energy Act preempts the application of a state punitive damages law, which punishes people who recklessly inflict injury on others, where the injury was caused by the release of plutonium from a federally regulated nuclear facility.

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Appellant,

v.

KERR-McGEE CORPORATION and KERR-McGEE NUCLEAR CORPORATION,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL WOMEN'S HEALTH NETWORK AS AMICUS CURIAE

The National Women's Health Network hereby moves this Court for leave to file the accompanying brief amicus curiae urging the Court to reverse the decision below. It is the position of amicus that

the Oklahoma punitive damages law seeks to deter tortious conduct committed with malice, oppression or fraud and is thus not preempted by the Atomic Energy Act, which regulates the use of nuclear materials unrelated to tortious conduct or the state of mind of the regulated user.

INTEREST OF AMICUS CURIAE

The National Women's Health Network (NWHN) is a non-profit organization, formed in 1975, and serves as the only national public interest organization devoted exclusively to women and health. Its objectives include changing the structure and character of our health care system to better meet the needs of consumers and health care workers, and addressing the abuses and inadequacies of

the present system. NWHN's 12,000 individual and 300 group members represent a constituency of almost half a million people.

NWHN is a broad-based women's health care organization whose interests will be affected by the disposition of the present proceeding. NWHN has a significant interest in ensuring that its members and the society at large are not harmed intentionally, maliciously or with reckless disregard for their well being by anyone, whether that person is federally regulated or not.

NWHN, in its attempt to effectuate its goals, finds it desirable, and often necessary, to take positions on either legislation or judicial decisions that have a significant effect on women's health. NWHN believes that the Court of

Appeals decision below, Silkwood v. Kerr-McGee, 667 F.2d 908 (10th Cir. 1981) has such an effect on women's health by preventing a state from punishing those whose harmful acts are committed with malice or reckless disregard for the safety of others and thus eliminating an important deterrent to malicious or reckless conduct. The mere existence of federal regulation of an industry should not by implication preempt state laws which punish all persons, including a regulated industry, where its reckless actions cause significant harm.

NHWN supports Appellant's position that the Atomic Energy Act does not preempt the Oklahoma punitive damages statute. The two laws were not intended to control the same activity, and do not conflict in their application. NHWN urges

this Court to reverse the Court of Appeals decision and reinstate the punitive damages awarded by the jury and approved by the District Court.

NWHN has sought the consent of the parties to the filing of this brief, but was only able to secure permission of Appellant.

Respectfully submitted,

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April 27, 1983

IN THE
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October Term, 1982

No. 81-2159

BILL M. SILKWOOD, Administrator of the Estate of KAREN G. SILKWOOD, Deceased,
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KERR-McGEE CORPORATION and KERR-McGEE NUCLEAR CORPORATION,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE NATIONAL WOMEN'S HEALTH NETWORK AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The interest of amicus is set out in the accompanying motion for leave to file this brief amicus curiae.

STATEMENT OF THE CASE

The representative of the estate of Karen Silkwood brought this tort action for injury suffered by Karen Silkwood, a worker at defendant's federally-regulated nuclear facility, as a result of her exposure to radiation from plutonium found in her apartment. The jury in this diversity suit found defendant's conduct reckless,[1] and awarded in addition to $505 thousand actual damages for personal and property injuries, $10 million in punitive damages. The District Court upheld the actual and punitive damages

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[1] The word "reckless" as used throughout this brief encompasses the concepts of wanton disregard of another's rights or such gross negligence that malice or evil intent will be inferred, as provided by jury instruction No. 19 at trial. Silkwood v. Kerr-McGee, 485 F.Supp. 566, 603 (W.D. Okla. 1979).

awards. Silkwood v. Kerr-McGee Corp., 485 F. Supp. at 590-91. Chief Judge Theis rejected the claim that the federal preemption doctrine precluded award of common law tort remedies for injuries caused by exposure to radiation.

Defendant appealed, claiming inter alia, that the Federal Atomic Energy Act, which established a federal mechanism for developing, utilizing and controlling atomic energy, preempts the Oklahoma punitive damages statute. The District Court decision was reversed in part by the Tenth Circuit, with Judge Doyle dissenting.[2] Silkwood v. Kerr-McGee, 667

[2] The Court of Appeals also struck down the $500 thousand personal injury award holding that Karen Silkwood's injuries were job related, thus invoking the sole remedy of worker's compensation. Silkwood v. Kerr-McGee, 667 P.2d at 918.

F.2d 908, 922-23 (10th Cir. 1981). Rehearing, and rehearing en banc were denied on February 19, 1982. Appellant's Jurisdictional Statement was filed on May 20, 1982.

The Oklahoma statute allows punitive damages "for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed...." 23 Okla. Stat. § 9 (1971).

The Atomic Energy Act regulates the use of nuclear power by issuance of licenses and permits, subject to particular regulations. The regulation of relevance here controls the quantity of plutonium which can be released from a nuclear facility. 10 C.F.R. § 20 (1982). The Atomic Energy Act also establishes a

system of federal insurance to provide funds to persons who are injured as the result of the operation of nuclear facilities and who recover judgments under state tort law. (Price-Anderson Act (42 U.S.C. § 2210)).

SUMMARY OF THE ARGUMENT

Since 1954 when Congress enacted the Atomic Energy Act, it has had occasion to amend the statute and related statutes several times. In the original Act, and through many of these amendments, Congress has re-emphasized that states retain important rights even though the exercise of these rights may impact upon the development of nuclear power. Only recently, this Court held that the Congressional decision to preempt state

law expressed in the Atomic Energy Act should be narrowly limited to those state laws which have nuclear safety as their purpose. In 1957, when Congress adopted a federal system to provide insurance to cover claims arising from public exposure to radiation, it went out of its way to preserve state common law and statutory tort liability. Even when the courts held that states could not directly and more stringently regulate air emission of radiation from nuclear plants, Congress quickly amended the law to restore the state's right.

It is against this strong history of protecting traditional state interests that this Court should now examine the decision of the court below. That court held that the Oklahoma statute allowing

punitive damages is preempted by the Atomic Energy Act. In effect, the court concluded that a company which is regulated by the Nuclear Regulatory Commission, and which commits a tort in such a manner that it constitutes reckless disregard of the welfare of others, is immune from imposition of punitive damages for its conduct if it happens to commit the tort by exposing the plaintiff to radiation.

It is apparent that because the Oklahoma law seeks to punish and deter a tortfeasor's particular state of mind, and the Atomic Energy Act seeks to regulate the use of nuclear material to protect the public health and safety, that the two laws regulate entirely different conduct, and do not conflict or

even compete with each other. For these reasons, preemption is totally inappropriate.

ARGUMENT

THE OKLAHOMA PUNITIVE DAMAGES STATUTE NEITHER CONFLICTS WITH THE ATOMIC ENERGY ACT NOR HAS CONGRESS EXPRESSED AN INTENT THAT IT BE PREEMPTED BY THE ACT.

A. The Oklahoma Punitive Damages Statute And The Atomic Energy Act Do Not Regulate The Same Conduct And Thus A Preemption Issue Is Not Presented.

Preemption analysis is not applicable in this case. As a matter of common sense, there is not a basis for embarking upon a preemption analysis unless there are two laws, one federal and one state, which regulate the same conduct. Here, that is not the case.

In this case, the only federal law at issue involves the regulation of the emission of plutonium from defendant's nuclear power plant. The Nuclear Regulatory Commission has adopted regulations establishing the limits for releases of plutonium by defendant and others, and imposes punishment on those who violate the regulation. The Oklahoma statute punishes a defendant for committing a tort (irrespective of whether the action does or does not comply with federal regulations) with the state of mind characterized as "oppressive, fraudulent or malicious." In short, "the matter on which [Oklahoma] asserts the

right to act" is not "in any way regulated by the federal government." Rice v. Santa Fe Elevator Corp., 313 U.S. 218, 236 (1947).

An examination of the purposes of the two statutes will further illustrate the distinction between the activities which the statutes regulate.

The regulatory purpose of the Atomic Energy Act is to assure that nuclear power is developed "to the maximum extent consistent with the common defense and security and with the health and safety of the public." 42 U.S.C. § 2013(b).

The purpose of the Oklahoma statute is to punish, and thereby deter, tortfeasors for the reckless manner in which they inflict harm on innocent people. Dayton Hudson Corp. v. Amer. Mutual Liab.

Ins. Co., 621 P.2d 1155, 1158 (Okla. 1980); see also Oller v. Hicks, 441 P.2d 356, 360 (Okla. 1967); Cox v. Theus, 569 P.2d 447 (Okla. 1977); Walton v. Bennett, 376 P.2d 240, 243 (Okla. 1962). It is the improper state of mind in the commission of a tort which controls the award of punitive damages. Dayton Hudson Corp. v. Amer. Mutual Liab. Ins. Co., 621 P.2d at 1158-59.

In addition, the elements required to establish a violation of the federal and state statutes are quite different.

Under the federal statute, if a licensee fails to comply with the NRC regulations it is liable, regardless of negligence or the licensee's state of mind. 42 U.S.C. § 2282. In contrast, under the Oklahoma statute, there is a

two step process. First, the court determines whether defendant has wronged plaintiff, and second, the court evaluates whether punitive damages are appropriate by examining the state of mind of the defendant when committing the tort. Cox v. Theus, 569 P.2d at 449-50. In this case, not only did the jury have to decide whether plutonium was an ultrahazardous substance, whether it originated in the Kerr-McGee facility, and whether Karen Silkwood's property or person were injured by it away from the worksite (all of which were required to establish that an actionable tort had been committed), but in addition, the jury had to decide whether Kerr-McGee's conduct was oppressive, fraudulent or malicious.

Because the federal and state statutes regulate different conduct, as evidenced by their entirely different purposes and the different elements required to establish a violation, preemption is inappropriate in this case.

B. The Oklahoma Punitive Damages Statute Does Not Satisfy The Prerequisites For Preemption Based On This Court's Preemption Analysis.

Fundamental to preemption analysis is an effort by courts to discern the intent of Congress in enacting the federal statute at issue. Because that is often a difficult task, this Court has taken great strides to avoid preemption

of state law whenever possible.[3] In its most recent decisions on preemption, this Court emphasized the intent and purpose of Congress in enacting federal legislation, and established minimum points of contact between federal and state statutes which must exist before a question of possible preemption arises. Pacific Gas and Elec. v. Energy Res. Comm'n., No. 81-1945, slip op. at 11 (April 20, 1983); Fidelity Federal Sav. & Loan Ass'n. v. De La Cuesta, 102 S.Ct. 3014 (1982). In the present case, these threshold points of contact do not exist.

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[3] See Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Ware, 414 U.S. 117, 127 (1973); Florida Lime and Avocado Growers v. Paul, 373 U.S. 132, 142 (1963); San Diego Unions v. Garmon, 359 U.S. 236, 243-47 (1959).

The most obvious contact point, and the one where this Court has had no problem finding preemption, is where the intent of Congress, as expressed in the language of the federal statute, forbids state regulation of a certain type, or expressly requires that federal regulation be exclusive and the state statute in fact attempts the prohibited regulation. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). It is clear that such express preemptive language is not present in this case.

A second contact point exists when the relationship between a federal and state statute is such that compliance with both is a physical impossibility. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. at 142-43. This contact

point does not exist between the federal and state statutes at issue, because Kerr-McGee can comply with federal regulatory standards, and also avoid reckless conduct.

A third contact point is present when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). This contact point is missing in this case, because there is no federal objective that the Oklahoma law frustrates. As already noted, the federal law establishes a program to develop nuclear power consistent with the defense of this country and the health and safety of its citizens. The Oklahoma law punishes those whose tortious conduct

may impact on the health and safety of others, but only if those tortfeasors have an improper state of mind.

The Court of Appeals, in a strained attempt to apply this third contact point to this case, asserted that the Oklahoma law stands as an obstacle to the "full purposes and objectives" of Congress in the Atomic Energy Act. That alleged obstacle does not exist.

First, the lower court created a new test for preemption -- i.e. that federal and state law "compete substantially" --and found such improper competition between the laws at issue here. Even assuming that "competing substantially" was a proper preemption test, the statutes at issue here do not meet it. As previously stated, the two statutes

regulate totally different conduct, and thus do not compete. The lower court's analysis was in error.

Second, the lower court found that a primary purpose of the Atomic Energy Act was the promotion of nuclear power, and thus any state statute which would tend to hinder that purpose should be pre-empted. In a recent decision, however, this Court held that the Congressional interest in promoting nuclear power is neither single-minded nor sufficient in itself to preempt state law. Pacific Gas and Elec. v. Energy Res. Comm'n., No. 81-1945, slip op. (April 20, 1983). In fact, unlike the present case, in Pacific Gas and Elec., the California statute directly halted all further nuclear power development in California, and yet this

Court concluded "Congress has left sufficient authority in the states to allow the development of nuclear power to be slowed or even stopped for economic reasons." Pacific Gas and Elec. v. Energy Res. Comm'n., No. 81-1945, slip op. at 30 (April 20, 1983). Surely Congress has left sufficient authority in the states to punish those whose tortious conduct is committed with reckless disregard, and who happen to commit their tort by the use of radiation.

The fourth contact point which, if present, warrants a preemption analysis is where "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where Congress touched a field in

which the "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject...." Rice v. Sante Fe Elevator Corp., 331 U.S. at 230.

This contact point is lacking as well in this case, because the statute is far from a comprehensive federal regulation of, and does not reflect a dominant federal interest in, all aspects of nuclear power. Quite the contrary. Congress specifically preserved traditional state functions in a number of areas.

(1) Congress left state common law tort liability intact when it adopted the

Price-Anderson Act[4] 42 U.S.C. § 2210, which requires nuclear facilities to carry insurance to pay damages for tort liabilities arising under state law.

(2) The Act preserves all state laws which regulate activity of nuclear facilities "for purposes other than protection against radiation hazards." 42 U.S.C. § 2021(k). This Court made this point clear in a recent decision

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[4] For torts such as the one involved here, Congress intended that the tort should "remain subject to the traditional rules of tort law", H.R. Rep. No. 2043, 89th Cong., 2d Sess. 11 (1966) -- i.e. to the rules of tort that prevailed before adoption of the Price-Anderson Act. In Duke Power v. Carolina Environmental Study Group, 438 U.S. 59 (1978) this Court recognized that prior to enactment of that Act, persons claiming radiation injuries retained the "right ... to utilize their existing common law and state law remedies to vindicate any particular harm visited upon them from whatever sources." Id. at 88-89 n.33.

which held that a state law which regulates nuclear power plants for economic reasons, a purpose "other than protection against radiation hazards" is not preempted. Pacific Gas and Elec. Co. v. Energy Res. Comm'n., No. 81-1945, slip op. at 6-7.

(3) The legislative history of the Act indicates that the Atomic Energy Act was interim legislation, the first step in the process of turning over extensive regulatory responsibility to the states.[5]

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[5] The Senate Report accompanying the bill contains a section-by-section analysis that even gives an estimate as to how long section 2021 should remain in effect before new legislation would be needed. The report explained:

> The purpose ... also provides for coordination of the development of radiation standards for the guidance of Federal agencies and cooperation with states, and recog-

S. Rep. No. 870, 86th Cong., 1st Sess. 12 (1959).

(4) Congress created a scheme whereby states could be delegated certain regulatory functions of the Nuclear Regulatory Commission when the governor "certifies that the state has a program for the control of radiation hazards" and when the Commission finds "that the State Program is compatible with the Commission's program for the regulation of such materials." 42 U.S.C. § 2021(d).

> nizes that this is interim legislation in that, as the states improve their capabilities, additional legislation may be needed, perhaps in approximately 5 years. (Emphasis added).
>
> S. Rep. No. 870, 86th Cong., 1st Sess. 12 (1959).

(5) Congress empowered states to impose regulations more stringent than NRC regulations with respect to air emissions of radioactivity in the Clean Air Act Amendments of 1977. 42 U.S.C. § 7422 (Supp. III 1979). It is important to note that in the only instance in which a court in a final order ruled that the Atomic Energy Act preempts a state regulation controlling the level of releases from a nuclear facility,[6]

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6 Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1981), aff'd. mem., 405 U.S. 1035 (1972). Because this Court merely affirmed without opinion the Eighth Circuit's decision, it has not endorsed the reasoning of the Court and the decision has less precedential weight than when this Court accords a full review. Pacific Gas and Elec. v. Energy Res. Comm'n., No. 81-1945, slip op. at 19 n.24.

Congress explicitly overruled that decision.

As this Court recently held in Pacific Gas and Elec. Co. v. Energy Res. Comm'n., No. 81-1945, slip op. (April 20, 1983), the scope of preemption under the Atomic Energy Act is narrowly circumscribed and does not sweep away great areas of traditional state authority, e.g., economic regulation of nuclear utilities. The Atomic Energy Act does not preempt any traditional state functions absent explicit preemptive language, even where the state functions directly impact on nuclear facilities and spring from a consideration of factors uniquely nuclear.

Thus, when the facts of this case are analyzed in light of the traditional starting points for preemption analysis established by this Court, no point of contact is found between the Atomic Energy Act and the Oklahoma punitive damages statute. It was inappropriate for the Court of Appeals to find preemption.

CONCLUSION

Oklahoma, like many states, protects its citizens from reckless infliction of harm by the imposition of punitive damages when such conduct causes injury. Preventing harm through the application of common law principles, including punitive damages, is an important part of what a state does. To deprive the state

of the availability of such vital protection for the health and safety of its citizens by operation of the pre-emption doctrine, requires clear and explicit legislative language or intent. Neither are present here.

Nothing in the Oklahoma law does or can interfere with the lawful and proper regulation of the production and use of nuclear material. The Court of Appeals decision that this Oklahoma law is impliedly preempted by federal statute should be overruled.

Respectfully submitted,

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April 27, 1983

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No. 81-2159

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BILL M. SILKWOOD, Administrator of the
Estate of KAREN G. SILKWOOD, Deceased
Appellant,

v.

THE KERR-McGEE CORPORATION, A Delaware Corporation, and
THE KERR-McGEE NUCLEAR CORPORATION,
A Delaware Corporation
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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No. 81-2159

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BILL M. SILKWOOD, Administrator of the Estate of KAREN G. SILKWOOD, Deceased

Appellant,

-v-

THE KERR-McGEE CORPORATION, A Delaware Corporation, and THE KERR-McGEE NUCLEAR CORPORATION,

A Delaware Corporation

Appellees,

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The New Jersey Department of the Public Advocate[1] (Department) respectfully moves this Court for leave to file the attached brief amicus

[1] The Department, an independent executive agency of New Jersey state government, N.J.S.A. 52:27E-2, is specifically empowered to "represent the public interest in such administrative and (Footnote continued on next page)

curiae in this case. The consent of the attorney for the appellant has been obtained. The consent of the attorney for the appellees was requested but refused.

The Department provides legal representation in a wide range of "public interest" cases through its Division of Public Interest Advocacy, N.J.S.A. 52:27E-28 to 32, involving housing, health, the environment, and social welfare benefits.[2] Additionally, through a Division of Rate Counsel, the Department represents the public interest in proceedings before any State department or agency "charged with the regulation or control of any utility regarding...the

(Footnote 1 continued)
court proceedings...as the Public Advocate deems shall best serve the public interest," N.J.S.A. 52:27E-29.

2 See, e.g., So. Burlington County N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975), (Mt. Laurel I), cert. den. 423 U.S. 808 (1975), suppl. 92 N.J. 158, 456 A.2d 390 (1983) (Mt. Laurel II) (fair share housing).

the fixing of a rate." N.J.S.A. 52:27E-18.[3]

The interest of the Department in this case arises from its frequent experiences with nuclear related issues affecting citizens of New Jersey[4] and its general statutory mandate to represent the "public interest."[5] New Jersey has several nuclear power plants, and its citizens will be

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3 The Division of Rate Counsel has litigated extensively in matters involving nuclear power, electric utility rates, and similar energy-related areas. See, e.g., Matter of Redi-Flo Corp., 76 N.J. 21, 384 A.2d 1086 (1978). In re Petition of Jersey Central Power & Light Co., 85 N.J. 520, 428 A.2d 498 (1981). See also, In re Pennsylvania Power and Light Co., Federal Energy Regulatory Comm., Docket No. ER-81-400-000.

4 The Public Advocate has frequently appeared before the Nuclear Regulatory Commission to represent the interests of New Jersey citizens. See, e.g., In The Matter of Offshore Power Systems (Floating Nuclear Plants), STN 50-437; Atlantic Generating Station, 2 NRC 702 (1975); Public Service Electric and Gas Co. (Hope Creek 1 and 2), 5 NRC 769 (1977).

5 See Mt. Laurel Twp. v. Dept. of Public Advocate, 83 N.J. 522, 535, 416 A.2d 886, 893 (1980) (Department characterized as "a shining example of [the state government's] commitment [to the public interest]").

directly affected by the Court's decision on the nature and scope of relief available for tortious injuries from nuclear facilities.[6]

The Department seeks leave to present its views on two issues that have not yet been addressed by the parties or any court: (1) the role of punitive damages as an integral part of the legal tradition of virtually every legal system; and (2) the manner in which punitive damages fit into an integrated framework of federal-state regulation of nuclear licensees. Its brief traces the historical development of punitive damages and explains

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[6] Additionally, a petition for writ of certiorari from a decision of the state courts of New Jersey, raising a related issue is pending before the Court. Van Dissel v. Jersey Central Power and Light Co., 181 N.J.Super. 516, 438 A.2d 563 (App. Div. 1981), certif. den., 89 N.J. 409, 446 A.2d 142 (1983), cert. petit. filed, No. 81-2065, 50 U.S.L.W. 3918 (1982). Van Dissell presents the question of whether the Atomic Energy Act preempts a state common law tort claim by property owners for environmental damage to their property by a nuclear power plant. The resolution of this case will undoubtedly affect the disposition of Van Dissel.

why this remedy promotes traditional and vitally important attributes of a State's police power. Consideration of this history is essential for a proper resolution of the issues here. To our knowledge, no party or other amicus in this case will similarly develop the historical research or the other matters addressed.

For the above reasons,[7] the Department respectfully requests leave to file the attached brief amicus curiae in this case.

Respectfully submitted,

JOSEPH H. RODRIGUEZ
Public Advocate

By: _____
MICHAEL L. PERLIN*
Special Counsel to the Public Advocate
R. WILLIAM POTTER
Assistant Public Advocate
RICHARD E. SHAPIRO
*Counsel of Record

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[7] The Department has previously submitted, amicus briefs in other cases before this Court involving mental health issues. See, e.g., Kremens v. Bartley, 431 U.S. 119 (1977); Parham v. J.R., 442 U.S. 584 (1974).

No. 81-2159

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BILL M. SILKWOOD, Administrator of the Estate of KAREN G. SILKWOOD, Deceased

Appellant,

-v-

THE KERR-McGEE CORPORATION, A Delaware Corporation, and THE KERR-McGEE NUCLEAR CORPORATION,

A Delaware Corporation

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE OF THE STATE OF NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE

STATEMENT OF INTEREST OF AMICUS CURIAE

The New Jersey Department of the Public Advocate (Department), an independent and unique executive agency of New Jersey state government, N.J.S.A. 52:27E-2,[1] has, for almost nine years, litigated extensively in major areas affecting "the public interest." During this period, the Department has participated in a wide variety of proceedings involving issues relating to housing, employment, the environment, rights of the mentally handicapped,

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[1] The Department is specifically empowered to "represent the public interest in such administrative and court proceedings....as the Public Advocate deems shall best serve the public interest." N.J.S.A. 52:27E-29. "Public interest" is defined as "an interest arising from the Constitution, decisions of the court, common laws or other laws of the United States or of this state inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A. 52:37E-30. See, also N.J.S.A. 52-27E-31 (factors to be considered in deciding whether to represent a particular public interest).

utility regulation and nuclear power. [2] In these

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[2] The Department provides legal representation in a wide range of "public interest" cases through its Division of Public Interest Advocacy, N.J.S.A. 52:27E-28 to 32. See, e.g., So. Burlington Cty. NAACP v. Tp. of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975), cert. den. 423 U.S. 808 (1975), suppl. 92 N.J. 158, 456 A. 2d 390 (1983) (fair share housing); Klein v. Califano, 586 F.2d 250 (3 Cir. 1977) (nursing home funding); Overlook Terrace Management Corp. v. Rent Control Bd., 71 N.J. 451, 366 A.2d 321 (1976) rent control); Van Ness v. Borough of Deal, 78 N.J. 174, 393 A.2d 571 (1978) (applicability of public trust doctrine to beach access). Through a separate Division of Rate Counsel, the Department also represents the public interest in proceedings before any State department or agency "charged with the regulation or control of any business, industry or utility regarding...the fixing of a rate...for a product or service." N.J.S.A. 52:27E-18. That Division has litigated extensively in matters involving nuclear power and electric utilities regulation. See, e.g., Matter of Redi-Flo Corp., 76 N.J. 21, 384 A.2d 1086 (1978); In re Petition of Jersey Central Power & Light Co., 85 N.J. 520, 428 A. 2d 498 (1981); and In The Matter of Public Service Electric & Gas Co., (Hope Creek 1 and 2), 5 NRC 769 (1977). See also, In re Pennsylvania Power & Light Co., Federal Energy Regulatory Com., Docket No. ER 81-400-000 (Decision and Order of April 1, 1983, finding that "participation by the [Public] Advocate may be in the public interest...[p]articularly in view of [the] Advocate's capacity as a representative under State law of New Jersey [electric utility] customers." Id., at 5)

(footnote continued on next page)

proceedings, the important role of the Department as a representative of the public interest has been frequently acknowledged. [3]

(Footnote 2 continued)

The Division of Mental Health Advocacy, which represents "indigent mental hospital admittees" in individual matters involving their "admission to, retention in, or release from" mental hospitals, N.J.S.A. 52:27E-24, and in class actions on "an issue of general application to them, "N.J.S.A. 52:27E-25, has submitted, or moved for leave to file, amicus briefs in four other cases before this court involving mental health issues within its relevant experience and expertise. Kremens v. Bartley, 431 U.S. 119 (1977); Parham v. J.R., 442 U.S. 584 (1974); Mills v. Rogers, ___ U.S. ___, 102 S.Ct. 2442 (1982) (motion to file amicus brief out of time den. U.S. ___, 102 S.Ct. 990 (1982)); Jones v. United States, cert. granted ___ U.S. ___, 102 S.Ct. 999 (1983). See also, Pennhurst State School v. Halderman, 451 U.S. 1 (1981) (amicus brief filed by Division of Advocacy for the Developmentally Disabled of the Department of the Public Advocate, see N.J.S.A. 52:27E-41.1 to 41.5, along with "protection and advocacy systems," see 42 U.S.C. §6012, of forty-four individual states and territories).

[3] Recently, for example, the New Jersey Supreme Court characterized the Department as "a shining example of that commitment [by the government to the public interest,]" Mt. Laurel Twp. v. Dept. of the Public Advocate, 83 N.J. 522, 535, 416 A.2d 886, 893 (1980), and of "admirably further[ing] the principles embodied in our Constitution," id. at 536, 416 A.2d at 893, as it fulfills the role of "nourishing and revitalizing our political system," id.

This case presents the question of whether the traditional common law remedial authority of a State to award punitive damages for injuries caused by tortious conduct resulting in nuclear contamination within its borders is preempted by the federal Atomic Energy Act. The interest of the Department in this question arises from its frequent experience with nuclear related and other energy issues affecting citizens of New Jersey (note 1, supra) and its general statutory mandate to represent the "public interest." New Jersey has several nuclear power plants, and the public interest of large numbers of people in this State will be directly affected by the decision of this Court on the nature and scope of relief available for tortious injuries to persons or property resulting from the operation of these plants.

The Department appears as amicus curiae to address several fundamental aspects of preemption analysis that have not heretofore been

discussed by any court: (1) the historic role of punitive damages as an integral part of the legal tradition of virtually every legal system, including the Anglo-American common law system, in cases involving the public interest or violations of the public trust, and (2) the manner in which punitive damages, rather than conflicting with the federal regulatory scheme, actually fit into an integrated framework of federal-state regulation of nuclear licensees. An examination of both of these factors provides compelling support for the conclusion that the award of punitive damages under Oklahoma law in the present case is not preempted by the Atomic Energy Act.

STATEMENT OF THE CASE

Appellant Bill M. Silkwood, administrator of the the estate of his daughter, the late Karen G. Silkwood, filed a diversity suit against appellees Kerr-McGee Corporation and Kerr-McGee Nuclear Corporation in the United States District Court

for the Western District of Oklahoma, seeking compensatory and punitive damages (based on common law tort principles) for injuries suffered by his daughter during a nine-day period when she was exposed to and contaminated by plutonium. Silkwood v. Kerr-McGee, 667 F.2d 908, 912 (10 Cir. 1981). The jury was carefully instructed on the elements of exemplary or punitive damages under Oklahoma Law, Silkwood v Kerr-McGee Corp., 485 F.Supp. 566, 603 (W.D. Okl. 1979) (Jury Instruction No. 19), and its verdict included an award of $10 million in punitive damages.

On appeal, the United States Court of Appeals for the Tenth Circuit (Tenth Circuit), in a 2-1 decision, reversed in part the judgment of the district court on the ground that the Atomic Energy Act, 42 U.S.C. §§2011 et seq., preempted the State from awarding punitive damages for injuries relating to the operation of a nuclear power plant. Silkwood v. Kerr-

McGee, 667 F.2d, supra, at 921-23. Over the sharp dissent of Judge Doyle, the majority relied substantially on Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8 Cir. 1971), aff'd mem. 405 U.S. 1035 (1972), as its authority for the proposition that "any state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material" would be preempted, 667 F.2d at 923 (emphasis added), whether it be by "judicial award" or "direct legislative acts," id.

Judge Doyle rejected the majority's analysis, characterizing a tort action as "a far cry from a regulatory system." Id. at 929. He emphasized:

> No collision exists nor is one possible between the simple state law inspired tort action and the federal government. To say that preemption prevents the imposition of exemplary damages in connection with a civil judgment carries the preemption concept far beyond anything that could

> have been intended or could ever be implied.

Id.

This Court granted review to resolve the important question of whether a state punitive damages award is preempted by the federal Atomic Energy Act. ___ U.S. ___, 51 U.S.L.W. 3508 (1983).

SUMMARY OF ARGUMENT

Punitive damages have been an integral part of the fabric of virtually every legal system--both common law and pre-common law--known to recorded history. In the federal system, the development of tort law has traditionally been left to the States, and punitive damages have played an important role in promoting the essential values that are central to the state's historic police power. By affording a private remedy for reprehensible or reckless conduct that causes damage to person or property, punitive damages protect those significant individual

and societal interests that have always been the primary responsibility of the States throughout the history of this country.

The Atomic Energy Act of 1954 (Act) must be read against this historical background. Congress was not legislating in a vacuum, but instead against the backdrop of a venerable remedy traditionally available in state courts to deter or punish reckless actions jeopardizing the health, welfare and well-being of its citizens. Therefore, "Congress legislated here in a field which the States have traditionally occupied . . . so we start with the assumption that the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Pacific Gas and Electric Co. v. Energy Res. Comm'n, ___ U.S. ___ (1983), slip op. at 13, quoting from Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947). Yet,

neither in the Act nor its legislative history is there any indication that punitive damages, which affect "interests . . . deeply rooted in local feeling and responsibility," San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959), are unavailable to a person contaminated by radiation as a result of the reckless or grossly negligent conduct of the operator of a nuclear power plant. In light of this legislative record, the Tenth Circuit fundamentally erred in its conclusion that punitive damages--historically within the police power of the State--could be preempted by speculative inferences from Congressional silence.

In stark contrast to the Tenth Circuit's view, punitive damages facilitate, rather than impair, compliance with the dictates of the Act. The nuclear industry is largely self-regulated. Punitive damages, as well as other traditional state tort remedies, provide an essential means

for ensuring careful adherence by regulated facilities to the unique responsibilities associated with the development of nuclear power. Therefore, the Court of Appeals' notion that an award of punitive damages "competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material," Silkwood v. Kerr-McGee, 667 F.2d, supra, at 908, simply cannot be squared with the realities of the complementary role of states in affording its citizens traditional tort relief and the remedy of punitive damages.

ARGUMENT

I.

PUNITIVE DAMAGES HAVE BEEN OF CRITICAL IMPORTANCE TO VIRTUALLY EVERY RECORDED LEGAL SYSTEM; IN THIS COUNTRY, THEY TRADITIONALLY HAVE BEEN AN INTEGRAL PART OF THE STATES' HISTORIC POLICE POWERS

The remedy of punitive damages is an ancient one, traditionally available as a judicial response to a tort of outrage. It precedes the common law by hundreds of years and is entrenched in the fabric of the law of all but a handful of states. As will be explained below, in this country, punitive damages have assumed considerable importance in preserving the states' historic ability to protect the health and well-being of its citizens--a critical aspect of the historic police powers of the states. Consideration of this long and venerable tradition of punitive damages in both common law and pre-common law societies provides an essential backdrop for the proper resolution of the

preemption issues before the Court.

This case reflects precisely the type of "reprehensible conduct" in need of prospective deterrence, see Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974); IBEW v. Foust, 442 U.S. 42, 48 (1979), to which punitive damages are appropriately applied. An examination of the remedy's historical roots reveals no less.

A. Punitive Damages In Pre-Common Law Societies

It has been frequently stated that the right to punitive damages "is as old as the right to trial by jury," Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398, 419 (Ct. App. 1967), or that such damages "have always been recoverable at common law," Aladdin Mfg. Co. v. Mantle Lamp Co. of America, 116 F.2d 708, 716 (7 Cir. 1941). Both dicta understate the case: the concept of punitive damages dates back to at least 2000 B.C., some 3200

years prior to the first trial by jury,[4] and about the same amount of time prior to the reign of Edward I (when the phrase "common law" first came into use). See e.g., Maitland, The Constitutional History of England 22 (1931 ed.).

The roots of punitive damages are in the Code of Hammurabi: if a person were to steal an "ox or a sheep or an ass or swine or a boat" [sic, most likely should be "goat"] from a temple or palace, "he shall pay 30-fold"; if the owner is a "villein" (freeman), "he shall replace [its value] 10-fold." Laws of Hammurabi §68, reprinted in 2 Driver and Miles, eds., The Babylonian Laws 17 (1955).[5] Other portions of

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[4] See 1 Baildon, Select Civil Pleas, A.D. 1200-1203 49 (Selden Society ed. 1890), excerpted in Smith, Cases and Materials on the Development of Legal Institutions 218-219 (1965).

[5] This section probably dates back to even earlier Babylonian law. The thirty-fold restitution penalty was apparently adapted from a Sumerian law (several hundred years prior to Hammurabi's reign, see 1 Driver and Miles, (Footnote continued on next page)

the code reveal other similar punishments: a

(Footnote 5 continued)
supra, at 5) penalizing one in this manner for stealing cattle from the goddess Belît of Uruk. Id. at 82, n. 2. Other pre-Hammurabi texts reveal similar motifs. The code of Lipit-Ishtar -- which antedates Hammurabi by over 150 years, see Pritchard ed., Ancient Near Eastern Texts Relating to the Old Testament 159 (1950) (hereinafter "Pritchard I") -- mandates a penalty of one fourth the value of an ox to be paid by one who has rented it and damaged its tail. Lipit-Ishtar Lawcode, Sec. 37, reprinted in id. at 161. Similarly, the laws of Eshnunna -- a kingdom which flourished just before the beginning of the Hammurabi period, id. -- provided for punitive damages (10 shekels of silver) in the case of a farm worker who fails to complete harvest work, Laws of Eshnunna, sec. 9, reprinted in id. at 162, and, even more significantly, adopts a dual set of penalties to deal with cases where one assaults another volitionally and where the blow is done accidentally, id., secs. 46-47, reprinted in id. at 163.

In the Ur dynasty, punitive damages were assessed for malicious prosecution: if a man falsely accused another's wife of fornication and she was proved innocent, the accuser had to pay one-third of a mina of silver. The Laws of Ur-Nammu, §11, reprinted in Pritchard, ed., The Ancient Near East: Supplementary Texts and Pictures Relating to the Old Testament 88 (1969). Finally, under Sumerian law, another dual set of penalties is created: if a man accidentally hits a woman causing her to miscarry, the penalty is 10 shekels of silver; if he hits her deliberately, the penalty is 20 shekels. Sumerian Laws, rev. col. iv. §1, reprinted in id. at 89.

merchant who denies the receipt of money from his agent must pay sixfold, Laws of Hammurabi §107, reprinted in 2 Driver and Miles, supra, at 45; the agent who misappropriates that which belongs to his master must pay treble damages, Laws of Hammurabi §106, reprinted in id.[6] Although these penalties were fixed by law, "they may be regarded as resembling the 'vindicative or exemplary damages' of modern English law." 1 Driver and Miles, supra, at 500.[7]

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[6] See also, id. §12, reprinted in 2 Driver and Miles, supra, at 19 (five-fold damages in certain stolen property cases); id. §43, reprinted in id. at 27 (failure to cultivate rental land makes farmer liable to do additional ploughing beyond the terms of his agreement with the owner). These admittedly-difficult and obscure provisions are discussed in 1 Driver and Miles, supra, at 97-101, 136-138.

[7] Post-Hammurabi Assyrian laws perpetuate these concepts. The laws of Middle Assyria -- dating from the 15th to 12th centuries B.C., Pritchard I, supra, at 180 -- set up a dual set of penalties in bailment situations: if a clothier shall lose one's clothing, he must make simple

(Footnote continued on next page)

This recordation is not idiosyncratic.[8] Similar provisions are found in Mosaic and

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(Footnote 7 continued)

restitution; if, however, the clothier sells the goods (and is subsequently criminally prosecuted), he must make several-fold restitution as well. The Middle Assyrian Laws, Tablet M. ¶ 3, reprinted in id. at 188.

Also, the Hittite laws remarkably appear to establish a three-tier system for imposing civil punishment in certain death cases: the equivalent of first degree murder ("If anyone kills a Hittite merchant for (his) goods, he shall give [x minas of silver] and shall make three-fold compensation for (his) goods"), second degree ("[If] he had no goods with him, and anyone kills him in a quarrel, he shall give six minas of silver"), and manslaughter ("But if (only) the hand is doing wrong, he shall give 2 minas of silver"). The Hittite Laws, Tablet I, ¶ 5 (later version), reprinted in id. at 189.

[8] For recent overviews, see Belli, "Punitive Damages: Their History, Their Use and Their Worth in Present Day Society," 49 U.M.K.C.L. Rev. 1 (1980), and Riley, "Punitive Damages: The Doctrine of Just Enrichment," 27 Drake L. Rev. 195 (1977-1978).

Talmudic law,[9] in Roman law,[10] Athenian law[11]

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9 The Old Testament penalty for slaughter of stolen cattle was the restoration of five oxen for an ox, and four sheep for a sheep; if the cattle were not slaughtered, the restoration penalty was two-fold. Exodus 22:1,3,21,37. Multiple and punitive damages were also enacted in certain bailment misappropriation cases, see e.g., Horowitz, The Spirit of Jewish Law §282, at 525-526 (1953), for physical indignity, id. §315 at 597, 598, and in cases involving informers (one of the most grievous wrongs in Jewish law), id., §330 at 621-623.

10 Although Sedgwick suggests that exemplary damages were "unknown" in Roman law, 1 Sedgwick, Measure of Damages §355, at 701 (9th ed. 1912), a misassumption subsequently repeated by others, see, e.g., Brandwen, "Punitive-Exemplary Damages in Labor Relations Litigation," 29 U.Chi. L.Rev. 460, 462 (1962), multiple damages were in fact awarded in cases involving acts "involving physical injury perpetrated with an element of wanton wilfulness or conscious deliberation." Redden, Punitive Damages §22, at 25 (1980). See also, Nicholas, An Introduction to Roman Law, 217-225 (1977) (e.g., four-fold damages recoverable if a person was induced -- through metus, or duress -- to act to his own detriment); Lawson, Negligence in the Civil Law 7 (1950) (in Lex Aquilia, civil damage penalty doubled when defendant denied liability); Sanders, The Institutes of Justinian 412-413 (8th ed. 1888).

11 "If anyone wrongly causes damages to anyone else intentionally, let him pay double the amount of it; if unintentionally, the simple amount." MacDowell, The Law In Classical

(Footnote continued on next page)

Hindu law,[12] Germanic law,[13] early Anglo-Saxon law,[14] and Welsh law.[15]

(Footnote 11 continued)
Athens 153 (1978). Aristotle's words on the subject are still applicable:

> The generality of men are naturally apt to be swayed by fear rather than by reverence, and to refrain from evil rather because of the punishment that it brings than because of its own foulness.

Aristotle, Nichomachean Ethics, bk X, ch.9, at 1.

12 The Laws of Manu -- dating to about 200 B.C. -- provides for punitive damages in the cases of denial of debts, id. §51, reprinted in Kocourek and Wigmore, eds., Sources of Ancient and Primitive Law 469, 473 (1915); false swearing, id., §98, reprinted in id., at 477; and crop damages, id., §241, reprinted in id., at 488.

13 Defaulting on a debt resulted in a penalty of 15 shillings "above the debt which [the defendants] had promised." Lex Salica, Title L, reprinted in id., at 500, 508. This code -- from 400 A.D. -- is probably "the oldest written Germanic code which survives." Id., at 500, n.1.

14 Multiple and punitive damages are reflected in almost every aspect of King Aethelbirht's Dooms, the laws of a sixth century Kentish King. See id. at 512-518. The commentators note that, at early Anglo-Saxon law, a sum of damages was assessed "on every wound that could be inflicted on [a freeman's] person, for nearly every injury that could be done to his civil rights, honour, or peace; the sum being aggravated according to

(Footnotes 14 and 15 continued on next page)

B. Punitive Damages In The English Common Law

From the very beginnings of the English common law,[16] the concept of punitive damages has been an integral part of the legal system. Indeed, punitive damages have been an essential aspect of the modern common law tradition for over 200 years, arising first in two leading British cases during the reign of King George III.

(Footnotes 14 and 15 continued)
adventitious circumstances." Maine, Ancient Law 380 (1907), quoting 1 Kemble, Anglo-Saxon Laws and Institutions 177 (1841).

15 A tenth century Welsh text establishes an elaborate civil damage scale for physical assaults, with penalties increasing commensurately with the viciousness of the attack. See Laws of Howell Dda, ch. xxiii, reprinted in 1 Kocourek and Wigmore, supra, at 519, 548.

16 More than 700 years ago, a statute of Gloucester (6 Edw. I, c. 5 [1278]) awarded treble damages for waste. See Note, "Exemplary Damages in the Law of Torts," 70 Harv.L.Rev. 517, 518 (1957) (hereinafter "Exemplary Damages"). Subsequently, in a 1346 detinue case, damages would be doubled if the plaintiff could prove the writing in question had been "burnt or eloigned." Fifoot, History and Sources of the Common Law: Tort and Contract 29 (1953), quoting Y.B., 20 Ed. III (R.S.), p. 74.

In the first, following the publication by John Wilkes of an allegedly libelous pamphlet, the King sent his messengers and a constable to Wilkes' house, where they broke in and seized his papers on a general warrant; Wilkes sued, and asked for £5000, Wilkes v. Wood, Lofft 1, 98 Eng. Rep. 489 (C.P. 1763). In his charge to the jury, Lord Chief Justice Pratt stated:

> [A] jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.

Id., Lofft at 18-19, 98 Eng. Rep. at 498-499 (emphasis added). The jury returned a verdict of £1000 for the plaintiff, which was upheld by the court, id., Lofft at 19, 98 Eng. Rep. at 499, the first modern punitive damages award, Redden, supra, §22 (A)(2), at 26.

In the second case, Huckle v. Money, 2

Wils.K.B. 205, 95 Eng. Rep. 768 (C.P. 1763), the printer of the pamphlet in question was detained for six hours (but not otherwise physically damaged).[17] In the court's opinion refusing to set aside a £300 damage award (notwithstanding the plaintiff's admission that his actual damages could not have amounted to more than £20), the actual phrase "exemplary damages" first appears:

> The small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them in the trial; they saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the King's Counsel, and saw the solocitor of the Treasury endeavoring to support and

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17 The court noted he was kept "very civilly by [being treated] with beefsteaks and beer." Id.

> maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject...

Id., 2 Wils K.B. at 206-207, 95 Eng. Rep. at 769 (emphasis added).

C. Punitive Damages In The Federal System

The English cases described above represented "the jury's indignation at an especially outrageous attack on the plaintiff's security, or at wanton misconduct on the defendant's part," Lewis, Winfield on Tort §35, at 182-183 (6th ed. 1954), and set the stage for early American cases, see, e.g., Coryell v. Colbaugh, 1 N.J.L. 90, 91 (Sup. Ct. 1791) (injury in breach of promise to marry suit was "of the most atro-

cious and dishonorable nature," calling for exemplary damages); Tillotson v. Cheetham, 3 Johns. 56, 65, 66 (N.Y. Sup. Ct. 1808) (Spenser, J., concurring) (in "vindictive actions," jury should always be told "to inflict damages for example's sake, and by way of punishing the defendant"), see also, Sedgwick, supra, §§351-352, at 693-698.

This Court has, for over 130 years,[18] adhered to the view that "the question [of the propriety of the punitive damages doctrine] will not admit of argument," Day v. Woodworth, 13 How. 363, 371, 14 L.Ed. 181, 185 (1851), noting that

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18 The Court's tacit approval of the remedy actually dates to 1818, when, in a marine trespass admiralty case involving an illegal seizure on the high seas, it characterized the case as one of "gross and wanton outrage," which, if filed against the actual wrongdoers, would have been sounded in "the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct." The Amiable Nancy, 3 Wheat. 546, 553, 4 L.Ed. 456, 459 (1818). For an analysis of the special problems endemic to such cases, see Note, "Punitive Damages in the Admiralty," 5 Maritime L. 223 (1980).

"men are often punished for aggravated misconduct or lawless acts...[where] the wrong done...is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of defendant's conduct," id. (emphasis added).[19]

The fundamental role of punitive damages as a means of "providing security for individual

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19 This doctrine was subsequently expanded beyond the "[mere] doing of an unlawful or injurious act" to encompass acts "conceived in the spirit of mischief, or of criminal indifference to civil obligation," Phila., Wilmington and Balt. R.R. Co. v. Quigley, 21 How. 202, 213, 62 U.S. 73, 77 (1858). For a compendium of early cases, see Lake Shore & M.S Ry. Co. v. Prentice, 147 U.S. 101, 107-109 (1893).

This Court has repeatedly reaffirmed these policies during its several recent terms. See, e.g., IBEW v. Foust, supra; City of Newport v. Fact Concerts, Inc., 453 U.S. 247,266-267 (1981); Smith v.Wade, ___ U.S. ___ (April 20, 1983), slip. op. at 5 ("in the latter part of the last century, the doctrine [of punitive damages] was accepted as settled law by nearly all state and federal courts, including this Court"), and cases cited at nn. 3, 8, 12 and 13.

interests," Note, "In Defense of Punitive Damages," 55 N.Y.U.L.Rev. 303, 337 (1980) (hereinafter "Defense Note"), or "as a reminder of the duty of care society imposes on each of its members for the safety of all others," id. at 323, "according to defendant's accountability for the injury," id. at 315, in all cultures is clear.

Therefore, there are multiple rationales for punitive damages:[20] (1) punishment and deterrence, City of Newport v. Fact Concerts, Inc., supra; Smith v. Wade, supra, slip op. at 19-20, 25; Thiry v. Armstrong World Industries, -- P.2d --, 51 U.S.L.W. 2617 (Okla. Sup Ct., March 22, 1983); "Exemplary Damages," supra, at 522; Prosser, supra, at 9; Coryell v.

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[20] See generally, "Exemplary Damages," supra, partially reprinted in Oleck, Damages to Person and Property §275A, at 560.1 (1960); McCormick, "Some Phases of the Doctrine of Exemplary Damages," 8 No.Car. L.Rev. 133 (1929); (hereinafter McCormick); McCormick, Damages §§77-79, at 275-282 (1935); Prosser, Torts §2, at 9-14 (4th ed. 1971).

Colbaugh, supra; Tillotson v. Cheetham, supra; (2) revenge,[21] "Exemplary Damages," supra; Riley, 27 Drake L.Rev., supra; Wilkes v.Wood, supra; (3) fulfillment of public justice, Belli, 49 U.M.K.C.L.Rev., supra, at 5-6; Oleck, supra, §269 at 541;[22] (4) to eliminate self-help,[23] Grey v. Grant, 2 Wils. K.B. 252, 95 Eng. Rep. 794 (C.P 1764); Merest v. Harvey, 5 Taunt. 422, 128 Eng. Rep. 761

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21 As Oliver Wendell Holmes had noted:

> If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself and thus avoid the greater evil of private retribution.

The Common Law 4 (1881).

22 See also, e.g., Herman v. Hess Oil Virgin Islands Corp., 527 F.2d 767, 772 (3 Cir. 1975) (assess punitive damages "as an example to the community").

23 In early decisions, "one purpose of large awards was to prevent dueling." "Exemplary Damages," supra, at 522.

(C.P. 1814); (5) to vindicate constitutional rights, Scott v. Donald, 165 U.S. 58, 75-86 (1897); Huckle v. Money, supra; 1 Sedgwick, supra, §381 at 743; see generally, Bivens v. Six Unknown Named Agents, 403 U.S. 388, 395-397 (1971); (6) as a supplement to criminal sanctions, McCormick, 8 No.Car.L.Rev., supra, at 130;[24] "Defense Note," 55 N.Y.U.L. Rev., supra at 328, n.125 (and cases cited therein); United Construction Workers v. Laburnum Const. Corp., 347 U.S. 656, 665 (1954);[25] (7) or to reward the plaintiff for his public service

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[24] Punitive damages "tend to bring to punishment a type of oppressive conduct...which is theoretically criminally punishable, but which in actual practice goes unnoticed by prosecutors occupied with more serious crimes." Id.

[25] United Construction Workers has been relied upon by at least one circuit for its ruling that federal labor law (29 U.S.C. §187) did not preempt a punitive damage award under state law in a secondary boycott case "involving violent or wilful tortious conduct." Gulf Coast Building & Const. Trades Council v. F.R. Hoar & Son, Inc., 370 F.2d 746, 748 (5 Cir. 1967).

in bringing the wrongdoer to account, Neal v. Newburger Co., 154 Miss. 691, 123 So. 861 (1929), cited in McCormick, supra, §77 at 278, n.12; see also, Royal Business Machines v. Lorraine Corp., 633 F.2d 34, 49 (7 Cir. 1980) (punitive damages proper where "the public interest [would] be served by the award"); Thiry, supra ("the penalty should increase as the magnitude of the hazard to the public increases").

As the cases make clear, the remedy is similarly tailored to deal with a host of tortious behaviors:[26] where the action is "aggravated by evil motive, actual malice, deliberate violence, or oppression," Scott v. David, 165 U.S., supra, at 86, or is "reprehensible," Gertz v. Robert Welch, Inc., supra, where it reflects "aggravated

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[26] See generally, Burdick, The Law of Torts, §196 et seq. at 240 (4th ed. 1926); McCormick, 8 No.Car.L.Rev., supra at 133-135; McCormick, supra, §79 at 280-282; 1 Sedgwick, supra, §§363-368 at 710-726.

misconduct or lawless acts," Day v. Woodworth, supra, "gross and wanton outrage," The Amiable Nancy, supra, or the "conscious disregard of the rights of others," McCormick, supra, §79, at 280 (and cases cited at id.; n.6), or of societal interests, Ryan v. Foster & Marshall, Inc., 556 F.2d 460, 465 (9 Cir. 1977); Lampert v. Reynolds Metals Co., 373 F.2d 245, 248 (9 Cir. 1967);[27] where it is done "with intent to injure, with malicious outrage, with insult, or in revenge, or out of ill-will or desire to injure," 1 Sedgwick, supra, §364 at 716 (and cases cited at id., nn.117-122); where it is "reckless," Dorsey v. Honda Motor Co. Ltd., 655 F.2d 650, 656 (5 Cir. 1981), cert.

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[27] For more recent formulations, see, e.g., Knippen v. Ford Motor Co., 546 F.2d 993, 1002 (D.C. Cir. 1979); Macon-Bibb County Water and Sewerage Auth. v. Tuttle/White Constructors, Inc., 530 F.Supp. 1048, 1058 (M.D. Ga. 1981).

den. ___ U.S.___, 103 S.Ct. 177 (1982),[28] or where it reflects "conduct marked by violence and imminent threats to the public order," San Diego Building Trade Council v. Garmon, 359 U.S. 236, 247 (1959).[29]

Put another way, "punitive damages are based upon the degree of the defendant's culpability," Massachusetts Bonding and Insurance Co. v. United States, 352 U.S. 128, 133 (1956)

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[28] On this point, the Fifth Circuit cited the trial court opinion in the case before the Court for the proposition that "compliance with federal standards does not prevent awarding punitive damages if the defendant's conduct is reckless." Id., citing Silkwood v. Kerr-McGee Corp., 485 F.Supp. 566, 583-586 (W.D. Okl. 1979).

[29] As the Court has just reiterated:

> ... [P]unitive damages in tort cases may be awarded not only for actual intent to injure or evil motive, but also for recklessness, serious indifference to or disregard for the rights of others, or even gross negligence.

Smith v. Wade, supra, slip op. at 17-18. See also, id. at 13, n.10.

or outrageousness, see Durant v. Surety Homes Corp., 582 F.2d 1081, 1088 (7 Cir. 1978), in cases involving "great barbarity," Woert v. Jenkins, 14 Johns 352 (N.Y. Sup. Ct. 1817), the abuse of power under the color of authority,[30] or what has been pithily characterized as an "I-don't-care-attitude," Carroll v.Getty Oil Co., 498 F.Supp. 409, 417 (D. Del. 1980), partially quoting McHugh v.Brown, 125 A.2d 583, 586 (Del. Sup. Ct. (1956).

Furthermore, the availability of such a damage remedy is squarely within the core of

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30 Sedgwick supplies a portion of the court's opinion in Huckle v. Money, supra, not reproduced in Eng. Rep.:

> Whenever an injury is done under the color of authority,...if a master of a ship abuse the power by law vested in him over the sailors under his command,...the jury in assessing damages are not confined to the damages which have been actually sustained, but ought to assess exemplary damages.

1 Sedgwick, supra, §350 at 690 (quoting from Sayer, Damages 220 (1792)).

the historic police powers of the state. Just as the police power "guard[s] and promote[s] the public interests," Chicago, Burlington & Quincy R. Co. v. Illinois ex rel Grimwood, 200 U.S. 561, 26 S.Ct. 341, 346 (1906), and springs "from the obligation of the state to protect its citizens and provide for the safety and good order of society," Panhandle Eastern P. Line Co. v. State Highway Commission, 294 U.S. 613, 622 (1934), so does the ability of the states to enforce the remedy of punitive damages similarly promote the general welfare or "public interest." These salutory goals are accomplished because punitive damages provide for the "safety and good order of society," e.g., "Exemplary Damages," supra, at 521-522, punish and deter "socially disapproved conduct," Riley, 27 Drake L.Rev., supra, at 199, and enforce a "legitimate public purpose [by]...remedying a broad and general social...problem." Cf. Energy Reserves Group, Inc. v. Kansas Power and Light Co.,

___ U.S. ___, 74 L.Ed. 2d 569, 581 (1983). See also, Pacific Gas & Electric v. Energy Research Commission, ___ U.S. ___ (April 20, 1983), slip. opin. at 12-13. Therefore, in allowing for the award of punitive damages, the state is "exercising its historic powers over traditionally local matters as public safety and order," Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, 315 U.S. 740, 749 (1942), providing a remedy to further "the health and well-being of its citizens," Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, 430 U.S. 290, 303 (1977).

In sum, then, punitive damages are an integral part of the Anglo-American legal tradition, serving important public policy concerns by providing a specific punitive and deterrent remedy for tortious invasions of person or property, particularly those involving a violation of public

trust.[31] In the federal systems, they have been viewed as a traditional state remedy and an essential ingredient of the State's soverign police powers, protecting individual and societal interests. In dealing with acts of defendants that have "the character of outrage," Prosser, supra, at 9, punitive damages protect "each person's fundamental interest to be free from the risk of injury," "Defense Note," 55 N.Y.U.L.Rev., supra, at 345, and serve "society['s] ... interest in deterring and punishing all intentional or reckless invasions of the rights of others ..." Smith v. Wade,

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[31] The remedy has always been seen as particularly appropriate in matters "offensive and dangerous to the public good." 2 Sutherland, The Law of Damages, §393 at 1275 (3 ed. 1903). This is especially so in cases involving tortious conduct by "public services companies...upon [which] rest such special duties to the public." McCormick, 8 No.Car.L.Rev., supra, at 137; see 1 Sedgwick, supra, §371a at 727-728.

slip op. at 25 (emphasis in original). The States, therefore, have a significant constitutional interest in preserving the full force of "the only civil judicial steel hammer we have." Belli, 49 U.M.K.C.L. Rev., supra, at 23.

II.

NOTHING IN THE LANGUAGE OR LEGISLATIVE HISTORY OF THE ATOMIC ENERGY ACT, OR IN ANY PRECEDENT OF THIS COURT, SUPPORTS THE COURT OF APPEALS' CONCLUSION THAT THE TRADITIONAL AND HISTORIC CONCEPT OF PUNITIVE DAMAGES IS PREEMPTED AS A REMEDY FOR THE TORTIOUS ACTS OF FEDERALLY LICENSED NUCLEAR FACILITIES

Against this backdrop of the traditional, historical place of punitive damages in the law, and their integral role in promoting the State's police power in the federal system, it was incumbent upon the Tenth Circuit to predicate its preemption determination on a solid legal foundation.[32] Yet, the Tenth Circuit concededly could not find any direct or indirect expression

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[32] The court of appeals itself recognized the "strong presumption against preemption of state laws affecting such vital interests of its citizens as those involved in the instant case." Silkwood v. Kerr-McGee, 667 F.2d, supra, at 923. Yet, as amicus explains above, once having identified the importance of the State interest, the Tenth Circuit ignored the pertinent legislative history and the teachings of this Court in the preemption area.

of congressional intent to preempt punitive damages, Silkwood v. Kerr-McGee, 667 F.2d, supra, at 923, nor did the court of appeals state precisely how they could be deemed to conflict with the federal regulatory scheme, id. at 923. Instead, the basis of the court's preemption analysis was its belief, even in the absence of any express directive from this Court, that a federal court must hold "invalid any state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material." Id. In light of the important state interest in punitive damages, and this Court's prior pronouncements in the preemption area, this is a fragile reed upon which to bar entirely a traditional component of a tort action in state court.

Since "Congress legislated here in a field which the States have traditionally occupied... [this Court] start[s] with the assumption that the historic police powers of the States were not

to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Pacific Gas and Electric Co. v. Energy Resources Comm'n, supra, slip op. at 13, quoting from Rice v. Santa Fe Elevator Corp., 331 U.S., supra, at 230. Rather than precluding tort remedies and punitive damages in the nuclear power area, as the Tenth Circuit surmised, Congress has consistently recognized that "traditional [state] tort law principles" apply to all aspects of nuclear activities, see 42 U.S.C. §2210 (Price-Anderson Act); 1966 U.S. Code Cong. and Ad. News 3201, 3211, subject only to the special situation of a major nuclear disaster or "extraordinary nuclear occurrence" (ENO), as determined by the NRC, 42 U.S.C. §2210(n) (1); 10 C.F.R. §140.81-.85. See also, Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978). Even in

these circumstances, state tort laws, subject to certain exceptions, still control.[33] No reason surfaces from the legislative history

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[33] NRC regulations indicate that state tort law applies whether or not the NRC declares an ENO. For example, 10 C.F.R. §140.81(b)(4) provides in relevant part:

> If there has not been an extraordinary nuclear occurrence determination, the claimant must proceed (in the absence of settlement) with a tort action subject to whatever issues must be met, and whatever defenses are available to the defendant, under the law applicable in the relevant jurisdiction. If there has been an extraordinary nuclear occurrence determination, the claimant must still proceed (in the absence of settlement) with a tort action, but the claimant's burden is substantially eased by the elimination of certain issues which may be involved and certain defenses which may be available to the defendant. In either case the defendant may defend with respect to such of the following matters as are in issue in any given claim: The nature of the claimant's alleged damages, the casual relationship between the event and the alleged damages, and the amount of the alleged damages.

or the expression of congressional policy for excluding punitive damages from the broad endorsement of "traditional [state] tort law principles."[34]

Indeed, the entire history of Congressional regulation of nuclear power points unerringly in the direction of an absence of any Congressional intent to preempt punitive damages. When Congress first agreed to open nuclear power development to private enterprises in 1954, it made no mention of state responsibilities or the possible role of private damage actions, 42 U.S.C. §2031; Pacific Gas & Elect. v. Energy Res. Comm'n, supra, slip op. at 14-15.

Three years later, however, Congress adopted the Price-Anderson Act which demonstrated a clear resolve to leave all state tort

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34 Moreover, as will be explained below, the compensatory and punitive remedies available in common law tort actions serve to promote, not undermine, compliance with federal safety standards. See infra, at pp 49-58.

actions in place and undisturbed, except in the event of an ENO, which might lead to claims exceeding the insurance coverage of nuclear licensees. 42 U.S.C. §2210. Additionally, Congress sought to consolidate tort actions and speed the slow pace of litigation for the direct benefit of the victims of an ENO, Duke Power Co. v. Carolina Environmental Study Group, supra. Accordingly, the nuclear industry was required (a) to obtain all the insurance coverage available on the open market, and (b) to waive all defenses traditionally available in state tort action, once the NRC has ruled that an ENO has taken place. 42 U.S.C. §§2210 (m)-(o). Thus, rather than supporting a finding of preemption, the 1957 amendments -- since extended eight times -- strongly suggest that Congress was aware of the availability of state tort remedies, and fully endorsed individual recourse to the courts to vindicate personal and property injury of any kind associated with

nuclear accidents (up to the $560 million limit set in the Act), 42 U.S.C. §2210(k)(1). See also, Comment, "Federal Supremacy in the Regulation of Nuclear Energy: Where Do Punitive Damages Lie?" 13 Seton Hall L. Rev. 42, 58-60 (1982). That no specific mention of punitive damages can be found anywhere does not imply that they were precluded, but rather that Congress did not intend to disturb the existing panoply of common law remedies and actions otherwise applicable to nuclear licensees as well as to other activity similarly subject to federal regulation. Contrary to the view of the Tenth Circuit, amicus' reading of the legislative history supports the conclusion that punitive damages - "historically within the reach of the police power of the States [were] not silently taken away from the States." Askew v. American Waterways Operators, Inc., 411 U.S. 325, 343 (1973).

This conclusion is even more compelling

in the present case, for, as we have explained above, punitive damages have been a vital remedy in legal systems from time immemorial, and have played a central role in the implementation of general state policy in 46 of the 50 states. Smith v. Wade, supra, slip op. at 9. Consequently, a State's traditional and historic concern with redressing reckless or careless tortious conduct causing injuries to its citizens, even that resulting from the operation of nuclear power plants, "touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [this Court] could not infer that Congress had deprived the States of the power to act." San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959).[35]

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[35] This principle has been repeatedly reaffirmed in this Court's cases. See, e.g., New York Tel. Co. v. New York State Dept. of Labor, 440 U.S. 519 (1979); Farmer v.

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The majority of the Tenth Circuit, while according lip service to the historic state interest in punitive damages, Silkwood v. Kerr-McGee, 667 F.2d, supra, at 923, ignored the crucial remaining elements of the preemption equation discussed above. Only the vast extension of the doctrine of Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8 Cir. 1977), aff'd mem. 405 U.S. 1035 (1972) far beyond the limits of that specific decision provides any apparent support for the Tenth Circuit's conclusion that punitive damages are preempted by federal law. Yet, as this Court has recently recognized, Northern States dealt with a state regulatory scheme that "fell squarely within the field of safety regulation reserved for

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(Footnote 35 continued)
Carpenters, 430 U.S. 290 (1977) (intentional infliction of mental distress); Linn v. Plant Guard Workers, 383 U.S. 53 (1960) (libel); United Automobile Workers v. Russell, 356 U.S. 364 (1958) (violence); Youngdahl v. Rainfair,
(Footnote continued on next page)

federal regulation." Pacific Gas and Electric Co. v. Energy Resources Commission, supra, slip op. at 19, n. 24. It is quite another thing to extend this Court's summary affirmance in that case, id., to a situation involving remedial, private damage actions that have traditionally and historically been an essential ingredient of any legal system.[36]

(Footnote 35 continued)
Inc., 355 U.S. 131 (1957) (violence); United Construction Workers v. Laburnum Const. Corp., 347 U.S. 656 (1954) (threats of violence).

[36] Federal courts in different settings generally have declined to equate private injury suits with industry-wide regulation, although it has been "rarely discussed," Comment, 13 Seton Hall L. Rev., supra, at 52, n. 102, citing the only Supreme Court decisions which have mentioned the issue: UAW v. Russell, supra; and San Diego Bldg. Trades Council v. Garmon, supra; see, especially United Construction Workers, supra (upholding an award of compensatory and punitive damages for the victim of unfair labor practices, notwithstanding National Labor Relations Board jurisdiction to define and punish the same practice), and Int'l Assoc. of Machinists v. Gonzales, 359 U.S. 617 621-623 (1958) (reconciling a state damage verdict with the partial relief available through the NLRB, citing Laburnum and Russell approvingly.)

In sum, the Tenth Circuit erred in concluding that punitive damages are preempted by the Atomic Energy Act. There is no basis in the legislative history or in this Court's precedents for holding that citizens injured by the reckless or careless conduct of the operators of all other facilities or utilities are entitled to punitive damages, while the victims of nuclear facility tortfeasers are divested of a remedy that is an integral part of virtually every recorded legal system. The power to fashion policy in an area that historically and traditionally has been reserved to the State "is not to be denied on the basis of speculation about the unexpressed intent of Congress." New York Tel. Co. v. New York State Dept. of Labor, 440 U.S., supra, at 545.

III

THE TENTH CIRCUIT FAILED TO RECOGNIZE THAT PUNITIVE DAMAGES AND RELATED STATE TORT REMEDIES PROMOTE AND FACILITATE, RATHER THAN COMPETE WITH, COMPLIANCE WITH THE NRC'S RADIATION PROTECTION STANDARDS

In other contexts, this Court has sustained state common law remedies where they are not likely to conflict with federal regulations, (~~infra at p. 44, n. 34~~) (supra at p. 47, n. 36). Thus, in the area of labor management relations, despite the overriding federal presense, a unanimous Court has approved of state jurisdiction to compensate victims for harms not compensable under the federal act: "[A]s with the defamation actions preserved by [Linn v. Plant Guard Workers, 383 U.S. 53 (1966)], state court actions to redress injuries caused by violence or threats of violence are consistent with effective administration of the federal scheme." Farmer v. United Brotherhood of Carpenters and Joiners, Local 25,

430 U.S. 297, 299-300 (1977). See also Nader v. Allegheny Air Lines, Inc., 426 U.S 290, 299 (1976): "There is clearly no irreconcilable conflict between the statutory federal scheme and the persistence of common law remedies."

Silkwood's claim for punitive damages is of a similar character. Indeed, as will be shown, not only is it "consistent with effective administration of [NRC regulation]," Farmer, 430 U.S., supra, at 299-300, but case-by-case adjudications will affirmatively advance the goals and standards contained in the NRC code. This is so in large part because the NRC's radiation exposure regulations, 10 C.F.R. Part 20, vest extraordinary discretion in the companies they regulate. This discretion is then coupled with a generalized duty to seek ways to lower radiation exposures below existing numerical guides, due to the universally accepted premise that there is no such thing as a totally safe dose of ionizing radiation, no matter how small.

Crowther v. Seaborg, 312 F.Supp. 1205, 1231 (D. Colo. 1971). Thus, the standards provide that licensees

> should, in addition to complying with the requirements set forth in this part, make every reasonable effort to maintain radiation exposures and releases ... [to levels] as low as is reasonably achievable (emphasis added) 10 C.F.R. §20.1(c)

To advance toward the "as low as is reasonably achievable" ("ALARA") goal, licensees are asked to engage in a process which is as subjective as it is complex:

> The term [ALARA] means as low as is reasonably achievable taking into account the state of technology, and the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations, and in relation to the utilization of atomic energy in the public interest. Id.

No further definition of these critical terms is to be found; nor is the licensee required periodically to show its efforts on behalf of the ALARA goal as a condition to its license.

In such a context, the processes and remedies of traditional state tort laws may be indispensable if the ALARA standard is to be accorded the attention it demands. Therefore, access to common law remedies -- including one of its most effective tools, punitive damages -- far from undermining NRC regulations, actually supports and promotes compliance in a most practical, case-by-case manner.

In addition to ALARA, the NRC relies extensively on self-reporting and self-policing. See generally, 10 C.F.R. §21.21(a) (instructs licensees to "adopt appropriate procedures" to identify and report "deviations" or "defects") and §22.61 (imposes civil penalties on companies which "knowingly and consciously" fail to notify the NRC of their noncompliance). Furthermore, licensees are instructed to report the "theft or loss" of nuclear materials (such as the plutonium which contaminated Karen Silkwood) but only if "it appears to the licensee that a substantial

hazard may result." 10 C.F.R. §20.402(a) (emphasis added) ("Substantial hazard" is not defined in the regulation). Moreover, immediate notification is not mandated unless the licensee determines, e.g., that the plutonium "may have caused or threatens to cause" ... [d]amage to property in excess of $200,000," Id., at §20.403 (a)(4). Notification can be withheld for up to a day if the licensee believes that damage will lie between $2,000 and $200,000. Id., at §20.403(b) (4). Yet, obviously, NRC licensees may not be experts in the fine art of assessing the value of homes, furnishings, and personal effects that could be contaminated. This, of course, is a traditional jury role in specific cases. (The only portion of the Silkwood award sustained by the majority was on this very point: Liability of $5,000 for contaminated personal property which had to be destroyed. Silkwood v. Kerr-McGee, 667 F.2d, supra, at 920-921.)

Even the NRC's precise-sounding numerical radiation standards rest upon a shifting foundation of approximations and self-evaluation by the licensees. For example, the basic unit of occupational exposure, the rem, can be calculated only after braving a bewildering maze of inexact assumption-filled measurements. Indeed, the regulation permits alternative yardsticks to measure "rems" which show the folly of asserting objectivity or exactitude in the standards:

> If it is more convenient [to the licensee] to measure the neutron flux, or equivalent, than to determine the neutron dose in rads, ... one rem of neutron radiation may ... be assumed to be equivalent to 14 million neutrons per square centimeter incident upon the body; or if there exists sufficient information to estimate with reasonable accuracy the approximate distribution in energy of the neutrons, the incident number of neutrons per square centimeter equivalent to one rem may be estimated from the following table [which sets forth, inter alia, the "[a]verage flux to deliver 100 millirems in 40 hours"] 10 C.F.R. §20.403(b)(4).

Such expressions of convenience, approximation and average are found throughout the regulations. See, e.g., 10 C.F.R. §20.3(a)(4) (defines "calendar quarter", the basic duration of dose measurement, as 12 to 14 weeks), §20.102 (c)(1) (in estimating dose levels, "the licensee shall make a reasonable effort to obtain reports of the individual's previously accumulated occupational dose") (emphasis added), and §20.105(a) (describes estimates of "anticipated average radiation levels" and provides for NRC approval if "not likely" to exceed 0.5 rem in "one calendar year"). Taken together, they unmask any claim of surgical precision to NRC radiation standards. Plainly, in such a fluid state of regulation much depends upon the good faith and diligence of the federal licensee -- attributes which susceptibility to state civil

suits can only encourage.[37]

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[37] Similar policies underly the pattern of federal courts upholding substantial jury awards for compensatory and punitive damages against companies heavily regulated by federal agencies; See cases collected and discussed below, Silkwood v. Kerr-McGee, 486 F.Supp. at 577-587: "Had this Court instructed the jury that substantial compliance with governmental regulation would bar an award of actual damages in the area of nuclear power, the Court would have paved a new road in jurisprudence that heretofore has not existed in any comparable area of the law." Id., at 577 (emphasis added). For example, there is federal preemption of state safety regulation of commercial aircraft design, but state tort liability still attaches, In re Paris Air Crash of March 3, 1974, 399 F.Supp. 732 (C.D. Cal. 1975), Rigby v. Beech Aircraft Co., 548 F.2d 288 (10 Cir. 1977), and other cases cited at Silkwood, 488 F.Supp. at 578: "The same principles obtain in the field of drug manufacture and distribution..." (citations omitted). Id.

The sole cases to the contrary are two New Jersey cases, State Dept. of Environmental Protection v. Jersey Central Power & Light Co., 69 N.J. 102, 351 A.2d 337 (1976), and Van Dissel v. Jersey Central Power & Light Co., 152 N.J. Super. 391, 377 A.2d 1244 (Law Div. 1977), aff'd 181 N.J.Super. 516, 438 A.2d 563 (App. Div. 1981), certif. den. 89 N.J. 409, 446 A.2d 142 (1982), cert. pet. filed No. 81-2065, 50 U.S.L.W. 3918 (1982). Both cases are readily distinguishable from Silkwood: In State DEP v. JCP&L, the New Jersey Supreme Court ruled that the state had failed to prove causation in

(Footnote continued on next page)

As for punitive damages, which focus more

(Footnote 37 continued)
fact in a suit against a nuclear operator to collect damages for the destruction of fish; the court's further ruling that the claim was preempted is dictum. Id., at 106, 109-110 ("Cause in fact was an essential element in the State's case [which it failed to prove]." Id.) Moreover, unlike the escape of plutonium in Silkwood, which had no legitimate purpose, federal regulations "require[d] that the facility"...be shut down." Id., at 114 (emphasis in original). Therefore, even if the closing of the power plant had caused the fishkill, federal rules had compelled it to do so. Id. It is well-settled, of course, that when compliance with state standards would directly conflict with federal requirements, the former must yield. Florida Avocado Growers v. Paul, 373 U.S. 132 (1963); Pacific Gas & Elec. v. State Energy Res. Comm'n, supra, slip op. at 11 ("[S]tate law is preempted to the extent it actually conflicts with federal law" (emphasis added). In Van Dissel, a lower New Jersey court distinguished State DEP v. JCP&L, supra, in an action to recover damages from "shipworms" proliferating in a coastal waterway due to increased water temperature and salinity levels caused by the operation of a reactor, Van Dissel v. JCP&L, 152 N.J. Super. supra, at 396-398, 377 A.2d at 1246-1246. The court felt bound to follow State DEP v. JCP&L, supra, 152 N.J.Super., supra, at 401, 377 A.2d at 1249, but held for the claimants anyway on a theory of inverse condemnation, Van Dissel v. JCP&L, 152 N.J.Super., supra, at 403-410, 412, 377 A.2d at 1250-1255. A petition for cert. is pending before this Court. No. 81-2065, 50 U.S.L.W. 3918 (1982).

on the tortfeasor's state of mind than the injury actually suffered, Smith v. Wade, slip op. at 9-12, n. 8, 17-18, they serve an added and independent purpose. They remind licensees that a careless or reckless attitude will not be tolerated from those entrusted with such awesome public responsibilities. Id. at 15-18. For, absent the threat of stiff damage awards, these largely self-supervising companies would have little incentive to be ever watchful and fair as they, inter alia, consider ALARA and weigh whether even to report themselves in close cases.

CONCLUSION

Amicus' review of the history of punitive damages reveals that the Tenth Circuit seriously undervalued the critical significance of the State interest in affording a private remedy for reprehensible or reckless conduct that causes tortious injury to person or property. Once having failed to recognize the historic and traditional role of punitive damages, the court of appeals erroneously assumed that this essential attribute of the state's police power could be "silently taken away from the States." Askew v. American Waterways Operators, Inc., 411 U.S. 325, 343 (1973). This conclusion is not only at odds with the Court's preemption analysis but also severely undermines essential functions and responsibilities of the states in the federal system.

Indeed, punitive damages facilitate, rather than impede, the cooperative federal-state relationship contemplated by Congress and the

NRC in the nuclear energy area. Pacific Gas and Electric v. Energy Resources Comm'n, supra, slip op. at 12-19.

For the reasons stated above, amicus respectfully submits that the portion of the Tenth Circuit's judgment which concluded that the trial jury's award of punitive damages is preempted by the Atomic Energy Act should be reversed, and the case remanded for reinstatement of this damage award.

Respectfully submitted,

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No. 81-2159

In the Supreme Court of the United States

OCTOBER TERM, 1982

BILL M. SILKWOOD, ADMINISTRATOR OF THE ESTATE OF KAREN G. SILKWOOD, DECEASED, APPELLANT

v.

KERR-MCGEE CORPORATION and KERR-MCGEE NUCLEAR CORPORATION

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

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QUESTIONS PRESENTED

1. Whether the authority to award punitive damages under state law against a federally licensed plutonium processing facility for conduct regulated by the Nuclear Regulatory Commission is preempted by the Atomic Energy Act.

2. Whether the preemption of the authority to grant punitive damages under those circumstances violates the Due Process Clause.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2159

BILL M. SILKWOOD, ADMINISTRATOR OF THE ESTATE OF KAREN G. SILKWOOD, DECEASED, APPELLANT

v.

KERR-MCGEE CORPORATION and KERR-MCGEE NUCLEAR CORPORATION

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1981 (J.S. App. 1a). The petition for rehearing was denied on February 19, 1982 (J.S. App. 41a). A notice of appeal (J.S. App. 127a) was filed on May 10, 1982. The jurisdictional statement was filed with the Court on May 20, 1982. On January 10, 1983 the Court postponed consideration of the question of jurisdiction to the hearing of the case on the merits.

1. Appellant asserts that this case is within the Court's appellate jurisdiction under 28 U.S.C. 1254(2) because the court of appeals held Oklahoma's punitive damages statute (Okla. Stat. Ann. tit. 23, § 9 (West 1955)) invalid as applied to the circumstances of this lawsuit. In fact, the parties did not explicitly address the validity of the Oklahoma statute in the court of appeals, and the court of appeals did not mention the statute in its opinion. The court's decision seems to rest simply on the conclusion that federal law creates an immunity from state imposition of punitive damages, without passing on the question of the statute's validity. Section 1254(2) does not authorize an appeal under these conditions.

28 U.S.C. 1254(2) states that this Court may review cases in the courts of appeals "[b]y appeal by a party relying on a *State statute* held by a court of appeals *to be invalid* as repugnant to the Constitution * * * or laws of the United States" (emphasis added). Section 1254(2) may be invoked where the court of appeals has held that a state law is invalid, not in all conceivable circumstances, but only as applied to the facts of the case.[1] On the other hand, jurisdiction by appeal does not lie where the court has merely construed a state statute as inapplicable, in order to avoid questions about its validity.[2] Nor does appeal lie where the only issue addressed is the existence of a federal immunity, and the invalidity of a state statute is neither asserted by the litigants nor made a basis for the court of appeals' holding.

The distinction between attacking a state statute as applied, and resisting a particular exercise of state authority on the ground of a federal immunity (without contesting the validity of the statute), makes the choice between appeal and certiorari jurisdiction turn in part on

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[1] See *Malone* v. *White Motor Corp.*, 435 U.S. 497, 499 (1978); *Dutton* v. *Evans*, 400 U.S. 74, 76 n.6 (1970); *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, 491-492 (1958).

[2] 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4037, at 47-48 (1978).

the language chosen by the parties and the lower court. This Court has nonetheless consistently maintained the distinction, despite pressure to treat the two types of cases alike. A long line of decisions construing 28 U.S.C. 1257(2) and its predecessors has explained the reason:

> It is not enough that an appellant could have launched his attack upon the validity of the statute itself as applied; if he has failed to do so we are without jurisdiction over the appeal. The Judicial Code was intended to restrict our obligatory appellate jurisdiction to a narrow class of cases, and to foreclose an appeal as of right whenever the prescribed conditions have not been rigorously fulfilled.

Memphis Natural Gas Co. v. *Beeler*, 315 U.S. 649, 650-651 (1942).[3] The insistence that the parties (or the

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[3] See also *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 562-563 n.4 (1980) (" 'It is essential to our jurisdiction on appeal . . . that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws.' * * * [W]e view [appellants'] arguments as constituting claims of rights under the Constitution, which rights are said to limit the exercise of the discretion conferred by the statute on the trial court. * * * Such claims are properly brought before this Court by way of our certiorari, rather than appellate, jurisdiction"); *Rohr Aircraft Corp.* v. *San Diego County*, 362 U.S. 628, 629-630 (1960); *Hanson* v. *Denckla*, 357 U.S. 235, 244 & n.4 (1958); *Wilson* v. *Cook*, 327 U.S. 474, 480-482 (1946); *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 185-187 (1945); *Irvine* v. *Spaeth*, 314 U.S. 575 (1941); *Baltimore National Bank* v. *State Tax Commission*, 296 U.S. 538 (1935); *Indian Territory Illuminating Oil Co.* v. *Board of Equalization*, 287 U.S. 573 (1932); *Citizens National Bank* v. *Durr*, 257 U.S. 99, 106 (1921). See generally *Hart & Wechsler's Federal Courts and the Federal System* 637-640 (2d ed. 1973).

In these cases the state court sustained the state's action against a federal challenge, and the question was generally whether the *appellant* had framed his challenge as an attack on the statute (as applied) rather than as a claim of federal immunity. In appeals under 28 U.S.C. 1254(2) the federal court has sustained a federal challenge to state action, and the question is generally whether the *court* invalidated a state statute (as applied) or merely upheld a federal immunity.

court) expressly address the statute's validity provides a rein on a jurisdictional rule that could otherwise engulf this Court's obligatory jurisdiction. See *Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282, 298-303 (1921) (Brandeis, J., dissenting). But equally important, it provides assurance that the state (or federal[4]) court most familiar with a state's law has had a focused opportunity to consider questions of construction before speaking to the graver issue of the validity of a state statute under the Supremacy Clause. See *Wilson* v. *Cook*, 327 U.S. 474, 480 (1946).

Section 1254(2), which closely parallels Section 1257 (see *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 675-677 n.11 (1974)), has been read in the same narrow way.[5] In *Minnesota* v. *Hoffman*, 543 F.2d 1198 (8th Cir. 1976), for example, the court of appeals held that the Supremacy Clause precluded Minnesota from applying state water pollution control laws to the Army Corps of Engineers. The court of appeals did not say that the Minnesota law was pro tanto invalid; it said rather that the Corps' operations were constitutionally immune from state control. This Court dismissed the State's appeal for want of jurisdiction. *Minnesota* v. *Alexander*, 430 U.S. 977 (1977). Even those dissenting from the dismissal acknowledged that mandatory appellate jurisdiction could be "defeated by the Court of Appeals' failure to make express its invalidation of the statute as applied to the Corps" (*id.* at 978 n.1 (Stevens, J., dissenting)).[6]

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[4] See *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission*, No. 81-1945 (Apr. 20, 1983), slip op. 21.

[5] See *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (28 U.S.C. 1254(2) is to be narrowly construed).

[6] See also *County of Arlington* v. *United States*, dismissed for want of jurisdiction, No. 81-2019, (Oct. 4, 1982); *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, No. 81-896 (Feb. 23, 1983), slip op. 4.

The general principle in such cases is that appeals may not be taken where the invalidity of the state statute is neither an explicit basis for the litigant's federal claim nor a necessary predicate for the court of appeals' decision.[7] In this case the opinion of the court of appeals does not even mention Okla. Stat. Ann. tit. 23, § 9 (West 1955)—the statute that appellant contends was held unconstitutional. Neither did the briefs filed by the parties in the court of appeals contest or defend the constitutionality of Section 9. Appellees, who disputed the punitive damages awarded by the district court, argued instead that compliance with federal regulations negated the state of mind required for punitive damages, and that such damages—because they amounted to regulation—would impermissibly control conduct that was to be governed exclusively by the Nuclear Regulatory Commission (79-1894 Defendants-Appellants Br. 61-64). At most, both contentions assert simply a federal immunity, not the invalidity of Oklahoma's statute. Both are consistent with a conclusion that, for the reasons advanced by appellees, the Oklahoma punitive damages statute should be read not to cover this case. Appellant in the portion of his brief responding to those arguments did not mention the Oklahoma statute (79-1894 Plaintiff-Appellee Br. 49-54). Neither did the court of appeals. Moreover, we are informed by counsel for the parties that no certification was made to the Oklahoma attorney general that the constitutionality of

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[7] Cf. *United States* v. *Christian Echoes Ministry*, 404 U.S. 561, 563-564 (1972) (28 U.S.C. 1252). In *California* v. *Grace Brethren Church*, No. 81-31 (June 18, 1982), relied on by appellant (Br. 4), this Court held that an appeal under 28 U.S.C. 1252 was proper even though the district court had not expressly held 26 U.S.C. 3309(b) unconstitutional as applied to certain religious schools. In contrast to this case, however, the determination of unconstitutionality "'was a necessary predicate to the relief'" granted by the district court. Slip op. 11, quoting *United States* v. *Clark*, 445 U.S. 23, 26 n.2 (1980). The district court *had* expressly held unconstitutional the federal-state "unemployment compensation scheme," which included Section 3306. Slip op. 12.

the Oklahoma puntive damages statute had been drawn in question. See 28 U.S.C. 2403(b).[8]

2. It would appear, then, that this case does not satisfy the requirements for appellate jurisdiction under 28 U.S.C. 1254(2), since the court of appeals was not asked to decide, nor did it address, the constitutionality of Okla. Stat. Ann. tit. 23, § 9 (West 1955) as applied. The wisdom of the general rule against accepting jurisdiction under such circumstances is illustrated by several special aspects of this case. First, this is not one of those cases where the challenge to state law was raised after the state itself—by executive,[9] administrative,[10] or even judicial[11] action—asserted that its statute does indeed cover the facts before the federal court. Punitive damages were awarded here simply by virtue of the jury instruction given by the federal district judge, whose conclusions—however persuasive—give no authoritative indication of

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[8] The court of appeals did, as appellant notes (Br. 2-3), speak unambiguously of "preemption" of punitive damages by the Atomic Energy Act. See J.S. App. 21a-24a. But neither the majority (*ibid.*) nor the dissent (*id.* at 32a-40a) cited any Oklahoma case or statute which might define the circumstances under which Oklahoma allows awards of punitive damages. Instead, the issue addressed by both seemed to be whether the general common-law power to make such awards is preempted by the Act. See, *e.g.*, *id.* at 24a ("[a] judicial award of exemplary damages under state law * * * is no less intrusive than direct legislative acts of the state"); *id.* at 34a ("the issue [is] whether a civil action * * * is subject to preemption").

[9] See, *e.g.*, *City of Detroit* v. *Murray Corp.*, *supra* note 1 (city and county assessed taxes against appellee); *McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 178 (1940) (revenue officer assessed taxes against appellee).

[10] *Malone* v. *White Motor Corp.*, *supra* note 1 (state Commissioner of Labor and Industry imposed a pension funding charge on appellee).

[11] *Dutton* v. *Evans*, *supra* note 1 (state supreme court held coconspirator declaration admissible under state statute).

what is the state's policy.[12] Not even the court of appeals addressed the proper construction of Oklahoma's law. In these circumstances it seems unnecessary to invoke this Court's mandatory jurisdiction, which is designed to protect the state's interest in the integrity of its *statutory* law.

Second, Oklahoma's punitive damages provision is nothing more than a "legislative recognition [of] a common law rule of long standing and acceptance." *Symposium on the Oklahoma Law of Damages*, 6 Okla. L. Rev. 289, 293 (1953). It is part of a codification that restates rules of damages in the most general terms.[13] The state's courts exercise considerable freedom in interpreting such rules, much as they would the common law which the rules embody.[14] There is, therefore, little reason to reach out and sweep within this Court's mandatory jurisdiction a case only tangentially implicating Congress's purpose to assure Supreme Court review where a federal court invalidates a policy decision made by the state legislature as such.

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[12] Indeed, we have no indication whatever how the state might read its punitive damages law, since the court of appeals made no certification to the Oklahoma attorney general under 28 U.S.C. 2403(b).

[13] See, *e.g.*, Okla. Ann. Stat. tit. 23, § 3 (West 1955) ("[a]ny person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages"). Cf. *Associated General Contractors, Inc.* v. *California State Council of Carpenters*, No. 81-334 (Feb. 22, 1983), slip op. 13.

[14] In *Nixon* v. *Oklahoma City*, 555 P.2d 1283 (1976), the Oklahoma Supreme Court held that punitive damages could not be recovered against a municipality because the public had "little direct control" over its agents, and the deterrent effect of such damages was consequently minimal. *Id.* at 1285. "If no social benefit is to be derived from the imposition of exemplary damages, all legal justification for the award collapses" (*ibid.*). The court did not mention Okla. Stat. Ann. tit. 23, § 9 (West 1955) in its opinion.

It is difficult to say whether Oklahoma's courts would find that punitive damages could be awarded in the circumstances of this case. They might conclude, for example, that the "legal justification for the award" (see *Nixon* v. *Oklahoma City*, note 14, *supra*) was superfluous in light of the criminal and civil penalties which federal law may impose on licensees of plutonium processing and fuel fabrication facilities.[15] Alternatively, they might decide that compliance with federal regulations negates as a matter of state law the state of mind required by Section 9. It is also possible that they would conclude, as appellees have contended (Mot. to Dis. or Aff. 18-19), that punitive damages may not be recovered where the plaintiff's action for compensatory damages has been replaced by the workers' compensation law. See Okla. Stat. Ann. tit. 85, §§ 11-12 (West 1970 & Supp. 1982-1983).[16] None of those questions was addressed by the court of appeals, though it might very well have done so—had the issue of validity been explicitly raised—before holding that the state's legislature had unconstitutionally invaded the province of federal law.

3. Appellant argues (Br. 4-5) that the court of appeals' failure to address possible state law limitations on punitive damages is irrelevant, since this Court's jurisdiction is determined by the issues that the court of appeals actually did decide. As an abstract matter, that proposi-

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[15] See pages 18-19, *infra*.

[16] This uncertainty about the bounds of common law principles explains in part the limitation put on appeals by 28 U.S.C. 1254(2): it provides mandatory review when a state statute is held invalid, but not when state common law is displaced. It is not clear whether a state may finesse the distinction by making a statutory declaration of common law, as Oklahoma has in its damages statute. Cf. J.S. 17-22 ("The Decision Below Violated the Standards Respecting Preemption of Common-Law Rights Recognized by This Court."). But the Court need not address that question in this case, since the court of appeals did not consider the coverage of Okla. Stat. Ann. tit. 23, § 9 (West 1955).

tion is unexceptionable; but it does not aid appellant in this case. In each of the cases cited by appellant for this proposition (Br. 5 & n.9) it was beyond doubt that the lower court *did* decide the question of federal law on which this Court's jurisdiction turned.[17] In this case, by contrast, the court of appeals did not even cite the very statute appellant contends was held unconstitutional. Given the court's silence, it is difficult to say whether it assumed that the statute was unconstitutional as applied (28 U.S.C. 1254(2)), or whether it simply concluded that the district court had improperly ignored a federal immunity in allowing the jury to award punitive damages (28 U.S.C. 1254(1)). In attempting to define the basis for the court of appeals' decision, it is not only permissible but wise to consider the fact that the court

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[17] The very passage appellant quotes from *Orr* v. *Orr*, 440 U.S. 268 (1979), is prefaced by the statement that

> if there were ambiguity as to whether the State's decision was based on federal or state grounds, it would be open to this Court not to determine the federal question, but to remand to the state courts for clarification as to the ground of the decision.
>
> * * * * *
>
> *But there is no ambiguity here.*

Id. at 276 (citation omitted; emphasis added). See also *United States* v. *Raines*, 362 U.S. 17, 20 (1960) (28 U.S.C. 1252) ("the [district] court ruled that * * * the statute on its face was * * * unconstitutional in all its applications"); *United States* v. *Clark*, *supra*, 445 U.S. at 26 n.2 (28 U.S.C. 1252) ("a determination that * * * 5 U.S.C. 8341(a)(3)(A) was unconstitutional was a necessary predicate to the relief the Court of Claims granted"); *Delaware* v. *Prouse*, 440 U.S. 648, 652 (1979) (28 U.S.C. 1257(3)) ("[a]t least, it is suggested, the matter is sufficiently uncertain that we should remand for clarification * * *. Based on our reading of the opinion, however, we are satisfied that * * * the Delaware Supreme Court did not intend to rest its decision independently on the State Constitution"); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977) (28 U.S.C. 1257(3)) ("[t]here is no doubt that petitioner's complaint was grounded in state law * * *. It is also clear that respondent's claim of constitutional privilege was sustained").

failed to ask the questions that usually precede a holding that a statute is unconstitutional.

Because this is not a case where a "state statute was held by a court of appeals to be invalid as repugnant to the Constitution" (28 U.S.C. 1254(2)), the appeal should be dismissed for want of jurisdiction.[18]

SUMMARY OF ARGUMENT

In *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission*, No. 81-1945 (Apr. 20, 1983), slip op. 19, this Court made clear that "the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states." The authority to impose punitive damages—"private fines levied by civil juries" (*Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)) to punish and deter conduct the state deems unsafe—is not among those "expressly ceded" limited powers.

A. The Atomic Energy Act of 1954, 42 U.S.C. (& Supp. V) 2011 *et seq.*, gives the Nuclear Regulatory Commission ("NRC") the exclusive power to regulate the operation of facilities like Kerr-McGee's plant "in order to protect health or to minimize danger to life or property * * *." 42 U.S.C. 2201(b) and (i)(3). The exclusivity of that power was reaffirmed in the 1959 amendments to the Act. 42 U.S.C. (& Supp. V) 2021 (c)(1). Among the reasons Congress gave for withholding such authority from the states was that "the technical safety considerations are of such complexity that it is not likely that any State would be prepared to deal with them during the foreseeable future." H.R. Rep. No. 1125, 86th Cong., 1st Sess. 3 (1959). The NRC has implemented its authority with detailed regulations.

The Atomic Energy Act also provides a detailed system of civil and criminal penalties for violations of the Act,

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[18] For the reasons stated in our earlier brief (U.S. Br. 10-11), we believe this case does not present an issue worthy of review on writ of certiorari.

NRC regulations, and license conditions. Civil penalties may be imposed in amounts up to $100,000 per violation. 42 U.S.C. (Supp. V) 2282(a). The regulations permit states concerned about the safe operation of nuclear facilities to request the imposition of such penalties. 10 C.F.R. 2.206(a).

In this case the NRC conducted a thorough investigation of Silkwood's contamination, and concluded that the imposition of punitive sanctions was not warranted. Notwithstanding this conclusion, appellant seeks to uphold a $10 million punishment imposed on Kerr-McGee under state law. The authority to impose such a punitive damages award under state law for the same incident should be deemed preempted, for it plainly rests on substantive standards in conflict with those the NRC has set to govern licensee conduct. The jury in this case was charged that it, rather than the NRC, was to decide what constituted "reasonable care in handling plutonium" (J.S. App. 102a). Further, allowing the imposition of state-law punitive damages conflicts with the federal remedial scheme. The punitive award in this case was one hundred times the $100,000 penalty federal law permits per violation. 42 U.S.C. (Supp. V) 2282(a). Such a fine can upset the balance set by Congress between deterring unlawful conduct and encouraging the activities promoted by the Atomic Energy Act. It could also "adversely affect[] a licensee's ability to safely conduct licensed activities." 47 Fed. Reg. 9991 (1982).

B. The Price-Anderson Act, 42 U.S.C. 2210, does not support appellants' argument that punitive damages may be awarded. The Act does not apply to this case; in any event, as the legislative history demonstrates, Congress left to state law only the power to award compensatory damages.

Appellant argues that state authority to award compensatory damages necessarily entails the additional authority to award punitive damages. But that argument ignores this Court's conclusion that "the federal govern-

ment has occupied the entire field of nuclear safety concerns, except the limited powers *expressly* ceded to the states." *Pacific Gas & Electric Co., supra*, slip op. 19 (emphasis added). A primary purpose of punitive damages is to regulate an entire range of future conduct that cannot be controlled by an award of compensation. Congress wished the states to ensure that licensees compensate the public for the costs of accidents. Congress also required the nuclear industry to take additional measures to protect the public health and safety, but it left the definition and the enforcement of those additional measures to the NRC.

ARGUMENT

THE ATOMIC ENERGY ACT PREEMPTS THE AUTHORITY OF THE STATES TO AWARD PUNITIVE DAMAGES AGAINST OPERATORS OF NUCLEAR FACILITIES FOR CONDUCT REGULATED BY FEDERAL LAW

In *Pacific Gas & Electric Co., supra*, this Court rejected California's claim that a state could forbid construction of nuclear power plants until its safety concerns were satisfied by the federal government (slip op. 19-20; footnote omitted):

> State safety regulation is not preempted only when it conflicts with federal law. Rather, the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states. When the federal government completely occupies a given field or an identifiable portion of it, as it has done here, the test of preemption is whether "the matter on which the state asserts the right to act is in any way regulated by the federal government." *Rice* v. *Santa Fe Elevator Corp.*, [331 U.S. 218, 236 (1947)].

The award of punitive damages for violation of state standards (set by a jury) regarding the safe operation of a plutonium production facility is unquestionably a regulation within the "field of nuclear safety concerns." That

field is reserved to the federal government and forbidden to the states by the Atomic Energy Act, and the NRC has promulgated detailed regulations to implement its authority with respect to the regulation of those "safety concerns." The court of appeals correctly concluded that the state's authority to take punitive action was thus preempted.

A. The Atomic Energy Act And NRC Regulations Preempt "The Entire Field Of Nuclear Safety Concerns"

Appellant's brief, by reviewing at length the legislative history of the Price-Anderson Act and its amendments (Br. 24-27, 29-41), attempts to divert attention from the statute that governs this case. As appellant acknowledges (Br. 26), and as we make clear below (page 24), the Price-Anderson Act does not even apply here. The issue of preemption is instead governed by the Atomic Energy Act of 1954, and by the 1959 amendments that ceded to the states certain narrowly defined powers to regulate nuclear safety. Both the original Act and the 1959 amendments were designed to put the activities at issue here within the exclusive control of the NRC.

1. Until the enactment of the Atomic Energy Act of 1954, the federal government had maintained an absolute monopoly over atomic energy, leaving no role whatever for the states. *Pacific Gas & Electric Co.*, *supra*, slip op. 13-14. In order to encourage the private development of atomic energy, Congress relaxed the federal grip to a limited extent in the 1954 Act. Private persons were permitted to build and operate commercial reactors, and the states were authorized to decide "the economic question whether a particular plant should be built" (*id.* at 14). But Congress left with the NRC[19] the exclusive

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[19] The Atomic Energy Commission, established by the 1954 Act, was abolished by the Energy Reorganization Act of 1974, 42 U.S.C. (& Supp. V) 5801 *et seq.* Its licensing and regulatory functions

power "to govern the possession and use of special nuclear material," [20] and to "govern[] the design, location, and operation of facilities" (such as Kerr-McGee's plant) that use such material, "in order to protect health and to minimize danger to life or property * * * ." 42 U.S.C. 2201(b) and (i)(3). Licenses for use and transfer of plutonium and for the operation of production facilities [21] require compliance with NRC "safety standards * * * to protect health and to minimize danger to life or property * * *." 42 U.S.C. (& Supp. V) 2073(e)(7), 2077, 2133(b). As this Court noted in its first decision involving the licensing provisions of the Act, "the responsibility for safeguarding [the] health and safety [of the public] belongs under the statute to the Commission." *Power Reactor Development Co.* v. *Electricians*, 367 U.S. 396, 404 (1961).

In 1959 Congress amended the Atomic Energy Act to grant the states some role in protecting the public health and safety from radiation hazards presented by nuclear materials. 42 U.S.C. 2021(a)(1), (2). The principal substantive provision of the amendment, Section 274(b), 42 U.S.C. (Supp. V) 2021(b), authorizes the NRC, by agreements with state governors, to discontinue its regulatory authority over byproduct and source material (not involved here), and over special nuclear material "in quantities not sufficient to form a critical mass." The chief limitation on the subject matter of such agreements is contained in Section 274(c), which states (42 U.S.C. (& Supp. V) 2021(c)):

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were transferred to the Nuclear Regulatory Commission. 42 U.S.C. (Supp. V) 5841(f). Despite the anachronisms that occasionally result, we will for the sake of simplicity refer to both agencies as "NRC" or "the Commission."

[20] "Special nuclear material" includes plutonium. 42 U.S.C. 2014(aa).

[21] Kerr-McGee was issued a special nuclear material license for the purpose of plutonium processing and fuel fabrication. See 10 C.F.R. 70.21(a).

> [T]he Commission shall retain authority and responsibility with respect to regulation of—
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> (1) the * * * operation of any production * * * facility * * *.

In the debate leading up to the 1959 amendments, the NRC gave examples of the activities reserved to the Commission by Section 274(c)(1) (105 Cong. Rec. 8384 (1959)):

> [S]uch activities as the processing of special nuclear material, fabrication of fuel elements and similar activities involving significant quantities of special nuclear material will remain subject to the licensing requirements and other regulatory controls of the Commission.
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> * * * * *
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> Such activities include, but are not limited to, the possession and storage at the site of the licensed activity of nuclear fuel and of source, special nuclear material and byproduct materials used or produced in the operation of the facility; the transportation of nuclear fuels to and from the reactor site; and the discharge of effluent from the facility.

See also *Federal-State Relationships in the Atomic Energy Field: Hearings Before the Joint Comm. on Atomic Energy*, 86th Cong., 1st Sess. 306 (1959); S. Rep. No. 870, 86th Cong., 1st Sess. 4, 10 (1959). The House and Senate Reports on the 1959 amendments make clear that this authority reserved to the NRC was exclusive. *Id.* at 8, 9; H.R. Rep. No. 1125, *supra*, at 8, 9. The reasons were several. To some extent the activities in Section 274(c) were thought to be ones "as to which interstate, national, or international considerations may be paramount * * *." But Congress also decided that "the technical safety considerations are of such complexity that it is not likely that any State would be prepared to deal with them during the foreseeable future." H.R. Rep. No. 1125, *supra*, at 3.

NRC regulations cover in great detail the operation of plants like Kerr-McGee's—including those operations bearing on the very sorts of risks that led to this case. The regulations require that workers be instructed about health hazards associated with radiation, and about procedures to minimize exposure (10 C.F.R. 19.12). They also set radiation dose standards for individuals both in and outside restricted areas (Sections 20.101-20.108 & App. B). Licensees must not only comply with specific exposure limits, but "should * * * make every reasonable effort to maintain radiation exposures, and releases of radioactive materials in effluents to unrestricted areas, as low as is reasonably achievable" (Section 20.1(c)). The regulations require licensees to assure that individuals entering restricted areas use personnel monitoring equipment (Section 20.202), to post warnings and in appropriate situations use control devices around radiation areas (Section 20.203), to report the theft or loss of licensed material (Section 20.402),[22] and to notify the NRC immediately of incidents of exposure to radiation (Section

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[22] Appellant argues that "Kerr-McGee's inventory system was so lax that three years after the plant was closed, over forty pounds (18,160 grams) of plutonium still could not be located" (Br. 14). This suggestion is misleading. In making inventory calculations, it is necessary to include in closing inventory the amount of plutonium "held up" in the plant itself. A study of the Cimarron plant by the Energy Research and Development Administration ("ERDA") in 1978 found that "plutonium * * * remained in the equipment, after very thorough cleanout, * * * dispersed in thin layers and small deposits on the inside surfaces of glove boxes * * *, in tanks, pipes, ducts and filters," and so on (Exh. 83, at 7).

When the estimate for "hold up" plutonium is included in the closing inventory, the evidence at trial showed an inventory difference (opening less closing) of 4.4 kilograms (9.68 lbs.) for the 1972-1976 period covered by this plutonium contract. That is .522% of the total receipts of 842 kilograms. The NRC permits an inventory difference of .500% (Tr. 7905-7919). See also *Problems in the Accounting for and Safeguarding of Special Nuclear Materials: Hearings Before the Subcomm. on Energy and Environment of the House Comm. on Small Business*, 94th Cong., 2d Sess. 565 (1976)

20.403). See also 10 C.F.R. Parts 70, 73.[23] Further detailed, tailor-made restrictions are included in individual licenses, which incorporate hundreds of pages of procedures and safeguards for individual facilities. See Def. Exhs. 1-5, 7.

The NRC also carries out an extensive inspection program to monitor compliance with the statute, regulations, and license requirements. During the period at issue here the Commission conducted a minimum of three or four inspections annually into "various areas that relate[d] to public health and safety, worker health and safety, protection of materials and facilities, and the environment" (Tr. 8145, 8148). In addition to periodic inspections, the NRC has "a policy that it will investigate any and all allegations [concerning] health and safety issues or potential health and safety issues" (*id.* at 8146). The Director of NRC's Region III Office, charged with oversight of Kerr-McGee's plant, testified at trial that "it was our view that the Kerr-McGee plant was being safely operated. If that were not the view of my office, I would have shut the facility down" (*id.* at 8157). See also

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("*Special Nuclear Materials Hearings*") ("the cumulative difference [was] * * * less than 0.5% of throughput").

With regard to the "hold up" plutonium the ERDA report concluded that "[a]lthough there is a significant quantity of plutonium within the physical confines of the building, the plutonium is spread out over about 30,000 square feet of glove box surfaces, tanks, equipment, and in nearly a mile of piping. It is the ERDA Team's opinion that the distribution of plutonium within the plant as it is now in standby is not a divertable source of plutonium" (P. Exh. 83, at 3).

[23] Appellant makes much of the fact that the Cimarron plant's detection system was not sensitive to amounts less than half a gram (Br. 14). But the security system—designed to prevent sabotage and theft of weapons materials—was not intended to be a safeguard against removal of smaller amounts of plutonium. Cf. 10 C.F.R. 73.40-73.60. The work practices and monitoring systems inside the plant which workers were required to employ were designed for that purpose.

Special Nuclear Materials Hearings, supra, note 22, at 548-1407.

Violations of the Atomic Energy Act and the regulations enforcing it are subject to strict criminal and civil penalties. 42 U.S.C. (& Supp. V) 2271-2284. Criminal conviction for willful violations of various provisions of the Act may result in substantial fines and imprisonment. 42 U.S.C. (& Supp. V) 2272-2278b, 2283-2284. The Attorney General may seek injunctive relief to prevent or stop violations of the Act or NRC regulations or orders. 42 U.S.C. 2280. The NRC itself can impose civil penalties for violations of specific licensing provisions of the Act. 42 U.S.C. (& Supp. V) 2282.[24] In 1980 Congress increased the maximum civil penalty to $100,000 per violation; if the violation is a continuing one, each day constitutes a separate violation. 42 U.S.C. (Supp. V) 2282(a). Finally, the NRC can initiate proceedings to modify, suspend, or revoke any license issued under the Act, and in an emergency, can make such action effective immediately. 10 C.F.R. 70.61-70.62.

NRC regulations also provide a procedure by which states concerned with the safe operation of nuclear facilities can request federal enforcement, including civil fines and license suspension. 10 C.F.R. 2.206 states that

> (a) Any person may file a request for the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, to institute a proceeding pursuant to § 2.202 to modify, suspend or revoke a license, or for such other action as may be proper.

The Directors' decisions are reviewable by the Commission itself (Section 2.206(c)(1)), and its decisions in turn

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[24] Since the time of Silkwood's contamination, the NRC has decided that civil fines may be imposed even in cases where there is no showing of licensee misfeasance, in the interest of specific and general deterrence. *In re Atlantic Research Corp.*, 11 N.R.C. 413 (1980).

are subject to judicial review (42 U.S.C. 2239). This procedure has been frequently invoked for the same purpose for which punitive damages were awarded here. *Lake Michigan Federation* v. *NRC*, 606 F.2d 1364 (D.C. Cir. 1979); *Illinois* v. *NRC*, 591 F.2d 12 (7th Cir. 1979); *Rockford League of Women Voters* v. *NRC*, 679 F.2d 1218 (7th Cir. 1982).

This detailed federal regulatory regime was in fact in operation in this very case. The NRC Regulatory Operations branch was notified of Silkwood's contamination, and investigated the incidents from November 8 to December 4, 1974 (Mot. to Dis. Or Aff. App. A1). In the course of its investigation of the incident the NRC interviewed 40 of Kerr-McGee's employees and others outside the plant. It reviewed the results of some 40,000 air samples taken throughout the plant, the plant's physical protection program (which had been inspected two months earlier), Silkwood's apartment and other areas where contamination might have occurred, and all medical data relevant to the incidents (*id.* at A7-A62). Regulatory Operations concluded that the contamination had resulted from something less than .0003 grams of plutonium, and "probably did not result from an accident or incident within the plant" (*id.* at A2, A6). Apart from Kerr-McGee's failure to record the voiding dates for two bioassay samples provided by Silkwood (*ibid.*; see 10 C.F.R. 20.401(c)), the investigation did not reveal any relevant violations of federal license conditions or regulations. On the basis of its investigation, the Commission concluded that the imposition of sanctions against Kerr-McGee was not warranted.

2. If, in this case, instead of awarding punitive damages, the State of Oklahoma had enacted its own regulations governing radiation exposure, plant security, and monitoring of those with access to restricted areas; if it had conducted its own investigation into the operation of appellees' plant after learning that Silkwood had been contaminated with plutonium, and concluded that appellees had violated those state regulations; and if on

that basis it had fined appellees $10 million, it would surely be clear that its action would be invalid—pre-empted by the Atomic Energy Act. The fact that Oklahoma's substantive rules governing plant operations competed with federal statutory and regulatory rules, and the fact that its penalties conflicted with the federal civil and criminal enforcement scheme, would be manifest.

In substance, what the state did here constituted—in a different form—precisely the same sort of forbidden intrusion into the federal substantive and remedial schemes. In this case the district court instructed the jury that under state law it should make its own determination of "what constitutes the exercise of reasonable care in handling plutonium, or the existence of reckless and wanton conduct, in light of the physical characteristics of that material and the risks associated with it" (J.S. App. 102a). If the jury concluded that appellees' conduct did not satisfy its standards, it was permitted to award punitive damages "as a punishment to [appellees] for the general benefit of society" and to deter similar offenses in the future (*id.* at 112a).

Like the enactment of state regulations, allowing a jury to define "what constitutes the exercise of reasonable care in handling plutonium" invades the field of nuclear safety concerns by setting up substantive standards in competition with those fixed by federal law. As we noted earlier, Congress made the Commission's authority exclusive because "the technical safety considerations are of such complexity that it is not likely that any State would be prepared to deal with them" (H.R. Rep. No. 1125, *supra*, at 3). It is less likely still that a lay jury could make an informed judgment on such issues. The NRC has set specific standards to govern radiation doses, instruction of workers, monitoring and control devices, accident reporting, plant security, and so on (see pages 16-17, *supra*). The jury charge in this case, by contrast, invited the jury to decide that "reasonable care in handling plutonium" required a licensee to follow additional

(or conflicting) procedures X, Y, and Z. But as this Court found in *Pacific Gas & Electric Co., supra*, with a few express exceptions the federal government has preempted the field of nuclear safety regulation. In those circumstances the Supremacy Clause precludes the state from addressing matters that are " 'in any way regulated by the federal government.' " Slip op. 19-20.

In addition to invading the area of federal substantive law, the state, by allowing punitive damages, provides a remedy that conflicts with the federal remedial scheme. As this Court has recently noted, "punitive damages, by their very nature, are not awarded to compensate the injured party. * * * [D]eterrence of future egregious conduct is a primary purpose of * * * punitive damages * * *." *Smith* v. *Wade*, No. 81-1196 (Apr. 20, 1983), slip op. 19.[25] But that is precisely the function served by the NRC's system of civil penalties, which implements the direction of 42 U.S.C. (& Supp. V) 2282.[26] As the NRC has stated (47 Fed. Reg. 9991 (1982)):

> Civil penalties are designed to emphasize the need for lasting remedial action and to deter future violations.
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> * * * * *

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[25] Indeed, the *Restatement (Second) of Torts* § 908 comment f (1979), notes that "punitive damages are sometimes disallowed unless the defendant's conduct was 'aimed at the public generally' * * *." See also *Dayton Hudson Corp.* v. *American Mutual Liability Insurance Co.*, 621 P.2d 1155, 1158-1159 (Okla. 1980) ("the primary and ultimate benefit of such damages accrues to the community as a whole").

[26] Congress's grant of this power to the Commission makes the preemption issue here entirely different from that involved in *United Automobile Workers* v. *Russell*, 356 U.S. 634 (1958), *United Construction Workers* v. *Laburnum Corp.*, 347 U.S. 656 (1954), and *Farmer* v. *Carpenters*, 430 U.S. 290 (1977), relied upon by appellant (Br. 46). For as the Court pointed out in *Russell*, 356 U.S. at 646, "[t]he power to impose punitive sanctions is within the jurisdiction of the state courts but not within that of the Board."

> The structure of [the penalty system] takes into account the gravity of the violation as a primary consideration and the ability to pay as a secondary consideration. * * * [I]t is not the NRC's intention that the economic impact of a civil penalty be such that it puts a licensee out of business (orders, rather than civil penalties, are used when the intent is to terminate licensed activities) or adversely affects a licensee's ability to safely conduct licensed activities.

It is obvious that allowing state courts to duplicate the NRC's system of penalties could have the very effects the Commission tries to avoid. If sufficiently severe, a state punitive award may exceed in amount what the Commission finds appropriate or even—as in this case—what federal law permits. Cf. 42 U.S.C. (Supp. V) 2282(a) ($100,000 per violation). Such a judgment could "put[] a licensee out of business," and thereby upset the balance set by federal law between deterrence of unlawful conduct and encouragement of the activities promoted by the Atomic Energy Act.[27] A less drastic award could still "adversely affect[] a licensee's ability to safely conduct licensed activities." Whether either consequence will ensue can only be determined by a careful assessment of both the licensee's financial situation and the costs of safe operation—matters entrusted by federal law not to the vagaries of a jury verdict but rather to the NRC's uniform and expert judgment.

3. Appellant suggests (Br. 22-24, 27-29) that the 1954 Act and "the 1959 amendments had nothing to do with

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[27] "There is little doubt that a primary purpose of the Atomic Energy Act was, and continues to be, the promotion of nuclear power. * * * The same purpose is manifest in the passage of the Price-Anderson Act, 42 U.S.C. § 2210, which limits private liability from a nuclear accident. * * * The continuing commitment to nuclear power is reflected in the extension of the Price-Anderson Act's coverage until 1987 * * *, as well as in Congress' express preclusion of reliance on natural gas and petroleum as primary energy sources in new power plants * * *." *Pacific Gas & Electric Co., supra*, slip op. 28-29.

the scope of state tort law applicable in suits arising from radiation injuries" (*id.* at 29). Rather, he argues, the Atomic Energy Act should only be understood to preempt "state *administrative* safety regulation" of nuclear facilities (Br. 23 (emphasis added); *id.* at 27 ("licensing, inspection and administrative regulation")). This contention rests on a simple misunderstanding of the Supremacy Clause. As this Court has frequently pointed out, state

> regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. * * * [Such control] cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

San Diego Building Trades Council v. *Garmon*, 359 U.S. 236, 247 (1959); *Local 926, Operating Engineers* v. *Jones*, No. 81-1574 (Apr. 4, 1983), slip op. 15 (claim for punitive damages under state law preempted by National Labor Relations Act); *Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317-318 (1981). Thus the question is not whether the state has regulated by means of "tort law" rather than "administrative safety regulation," but whether the rules and remedies created by state law invade the field set aside for federal law. Here they do so.

B. The Price-Anderson Act Does Not Support Appellant's Argument That The State Is Authorized To Award Punitive Damages

Appellant argues (Br. 24-27, 29-38) that in passing the Price-Anderson Act, 42 U.S.C. 2210, and its subsequent amendments,[28] Congress preserved the entire corpus

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[28] The Price-Anderson Act was enacted in 1957. Pub. L. No. 85-256, 71 Stat. 576. In 1965 the Act was extended for ten years. Pub. L. No. 89-210, 79 Stat. 855. In 1966 the Act was amended to

of "state tort law" for application "in any suits arising out of nuclear incidents" (Br. 25). But in treating "state tort law" as an undifferentiated whole, appellant obscures the important differences between compensation for private injuries and regulation of the safety of licensee conduct in the public interest. Although Congress has consistently indicated a desire to leave the former to state control, it has with equal clarity made the latter the exclusive province of the NRC.

1. It is important at the outset to recognize that the Price-Anderson Act itself does not apply in any way to this case. As appellant concedes, that Act was not made applicable to plutonium processing plants until 1977, after Kerr-McGee's plant was closed (Br. 26 & n.32).[29] Moreover, even for covered facilities, the Act does not say what law governs an operator's liability for claims arising from a nuclear incident. What it does, rather, is simply to require that licensees maintain financial protection (in the form of insurance or otherwise) (42 U.S.C. 2210(a) and (b)) and execute indemnity agreements with the NRC (42 U.S.C. 2210(c)), and to limit aggregate liability for any single incident to $560 million (42 U.S.C. 2210(e)).[30]

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remove impediments to collection of private compensation. Pub. L. No. 89-645, 80 Stat. 891. In 1975 the Act was again extended for ten years. Pub. L. No. 94-197, 89 Stat. 1111.

[29] We are informed that the decision to close the Cimarron plant was an economic judgment by appellees. It was not directed by the NRC.

[30] In the event of an "extraordinary nuclear occurrence" (see 42 U.S.C. 2014(j))—not involved here—the Act requires licensees and contractors to waive defenses, thereby in effect imposing strict liability (Section 2210(n)).

Appellant reads far too much significance into the waiver provisions in the NRC's forms for nuclear energy liability policies and indemnity agreements (Br. 38-40). Those forms provide that licensees shall waive "[a]ny * * * defense as to * * * the fault of the" licensee (10 C.F.R. 140.91, app. A, ¶ 1(b)(1), at 800; 140.92, app. B, art. II ¶ 4(a), at 805), a provision that might suggest the

2. The Price-Anderson Act nonetheless does shed light on the extent to which Congress intended to preempt state law when it passed the Atomic Energy Act. What emerges from a review of the legislative history of the Price-Anderson Act is a clear dichotomy between the provision of compensation under state law, and the regulation of safety under federal law. It is clear that Congress did not object to—indeed, it sought to promote—strict liability under state law for any harm caused by federal nuclear licensees. In effect, Congress wanted licensees to insure the public against the costs of even unavoidable accidents resulting from their operation, *i.e.*, to internalize all the external costs of their business. Such a rule of strict liability would be sensible, given

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licensee's willingness to pay any claims for punitive damages. Lest claimants or courts draw that improper inference, the forms go on to state that the waivers do not apply to

> Any claim for punitive or exemplary damages, provided, with respect to any claim for wrongful death under any State law which provides for damages only punitive in nature, this exclusion does not apply to the extent that the claimant has sustained actual damages, measured by the pecuniary injuries resulting from such death but not to exceed the maximum amount otherwise recoverable under such law.

10 C.F.R. 140.91, app. A, ¶ 2(c), at 800; 140.92, app. B, art. II ¶ 5(d), at 805. As the proviso makes clear, there are situations where—as a result of the oddities of state law—punitive damages are permitted as a surrogate for compensatory damages. But appellant errs in drawing the further inference that punitive damages may be collected whenever state law will permit them. On the contrary, the proviso implies that, except in the stated circumstances, punitive damages are unavailable. Cf. *Massachusetts Bonding Insurance Co.* v. *United States*, 352 U.S. 128 (1956). Indeed, the notice of proposed rulemaking concerning the forms makes clear that punitive damages generally are not authorized by the Price-Anderson Act (33 Fed. Reg. 6982 (1968) (emphasis added)):

> It has also been deemed advisable to make the waivers inapplicable to claims for punitive or exemplary damages, since *the intent of the legislation is to assure compensation* for injury or damage from an extraordinary nuclear occurrence.

the obvious ineptness of state common law for creating substantive rules of safe conduct applicable to nuclear facilities. If licensees were strictly liable, the only issues in state tort litigation would be causation and the calculation of the damages required to compensate the victim of harm; questions about the duty of care would be irrelevant. That division of authority is desirable from a federal perspective as well. Because there is no federal interest in specifying how compensation (up to a certain limit) is to be distributed, it is efficient to leave that matter to the states. By contrast, the definition of safety standards, and their enforcement in cases where external costs alone provide insufficient incentive for compliance, are matters that call for the expert judgment of the NRC.

The Atomic Energy Act of 1954 included no provisions regarding compensation for harm caused by operators of nuclear facilities, and Congress assumed that such compensation would be available in private actions under state law. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88-89 n.33 (1978). There were, as it turned out, two problems with that assumption. First, the unavailability of private insurance exposed licensees to potentially crippling liability, and thus created a "roadblock" to the development of nuclear power. S. Rep. No. 296, 85th Cong., 1st Sess. 1 (1957). Second, because an operator's "resources might well be exhausted at an early stage" (*Duke Power Co., supra*, 438 U.S. at 91), claimants had little assurance that they would in fact be compensated.[31] Those problems were addressed in the Price-Anderson Act by requiring financial protection, providing for government indemnity, and limiting liability.

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[31] Additional impediments to collection of private compensation—such as short statutes of limitations, state law immunities, and the uncertainty of recovery where state law did not impose strict liability—were removed by the 1966 amendment. See note 28, *supra*.

In the legislative history of the Act and its subsequent amendments, however, there is no evidence that Congress envisioned any kind of state law action *other* than one for compensatory damages. The Senate report on the bill enacted in 1957 states that its purpose was to "provid[e] adequate *protection against liability* arising from atomic hazards as well as a sound basis for *compensating the public* for any possible injury or damage arising from such hazards." S. Rep. No. 296, *supra*, at 8 (emphasis added). And in speaking of how the funds provided for by the Act should be distributed, the report on the 1966 amendments envisions "an allocation of appropriate amounts for personal injury claims, property damage claims, and possible latent injury claims * * *." S. Rep. No. 1605, 89th Cong., 2d Sess. 17 (1966).[32]

Congress's recognition of a right to state law compensation is almost invariably coupled with expressions of confidence that the NRC's regulation of nuclear safety

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[32] See also S. Rep. No. 296, *supra*, at 15; S. Rep. No. 650, 89th Cong., 1st Sess. 13 (1965) ("persons suffering damage from a nuclear incident may obtain rapid and adequate financial compensation"); H.R. Rep. No. 883, 89th Cong., 1st Sess. 13 (1965) (same); *Proposed Amendments To Price-Anderson Act Relating To Waiver Of Defenses: Hearings Before the Joint Comm. on Atomic Energy*, 89th Cong., 2d Sess. 34 (1966) (*"1966 Hearings"*) ("damage consist[ing] of personal injury or injury to property"); S. Rep. No. 94-454, 94th Cong., 1st Sess. 14 (1975) ("claims for actual losses to property, for actual and reasonable medical expenses, for loss of wages, * * * for alleged pain and suffering, emotional harm, and loss of consortium"). Cf. *Teamsters Union* v. *Morton*, 377 U.S. 252, 260-261 (1964).

Congress was aware, though, that even private actions under state law for compensation might require a helping hand from the NRC, because of the complexity of the subject matter. In speaking of the requirement that the Commission conduct a survey of the causes of some nuclear incidents (see 42 U.S.C. 2210(i)), the original Senate report said: "This survey * * * is, in part, an aid to the parties in any action where it is unlikely that the public would be able to obtain the full amount of technical information which might be required." S. Rep. No. 296, *supra*, at 24.

would make such claims unnecessary. As both houses noted when the Act was first extended, there was an "intimate relationship * * * between Congress' concern for prevention of reactor accidents and the indemnity provisions of the Price-Anderson legislation." S. Rep. No. 650, 89th Cong., 1st Sess. 5 (1965); H.R. Rep. No. 883, 89th Cong., 1st Sess. 5 (1965). The hearings that year opened with testimony by the Commission itself on the need for an extension (emphasis supplied):

> This recognition of national benefit to be derived from the development of peaceful uses of atomic energy was accompanied by recognition of the *responsibility of the Federal Government* to assure that there is appropriate protection of the public against hazards associated with uses of atomic energy materials.
>
> Interest in protection of the public safety has been evidenced in congressional legislation in several ways. The Congress included in the 1954 act * * * provisions designed to establish a *comprehensive regulatory program to assure that the health and safety of employees and the public would be adequately protected.* In 1957, Congress enacted the Price-Anderson Act which was designed to protect * * * the public by assuring that * * * funds would be available for the payment of damages.

Proposed Extension of AEC Indemnity Legislation: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy, 89th Cong., 1st Sess. 4 (1965) (*"1965 Hearings"*). But "[t]he Price-Anderson Act is not intended to substitute money for safety. Safety is the primary concern of the Commission * * *." *1966 Hearings, supra* note 32, at 9.[33] That division of authority—

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[33] See also *Governmental Indemnity: Hearings Before the Joint Comm. on Atomic Energy*, 84th Cong., 2d Sess. 60-61 (1956) (*"1956 Hearings"*) ("The Atomic Energy Act of 1954 gives to the Commission the responsibility of protecting the health and safety of the public[.] * * * However, it must be recognized that in spite

compensation under state law, safety regulation under federal law—was intended to apply even in cases where the licensee had *willfully* caused injury to the public:

> The suggestion * * * that willful damages be excluded was not accepted since the damage to the public is the same, whether caused by any means—willful or nonwillful. However, the circumstances surrounding any nuclear incident, including the willfulness, would certainly be grounds for examining and possibly suspending the operations under the license.

S. Rep. No. 296, *supra*, at 18.

It is natural that, having left the problem of compensation to state law, Congress should take a hard look at whether state remedial law was adequate to resolve the problem. The numerous references to state tort law collected in appellant's brief (Br. 24-27, 29-38) reflect nothing more than Congress's deliberations on that specific issue.[34] Congress ultimately concluded that, with a few

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of all precautions * * * an accident could occur"); S. Rep. No. 296, *supra*, at 2 ("The Commission has extensive powers to protect the public health and safety through its regulatory acts, and it also has mandate for a strong Inspection Division to see that the regulations are complied with. * * * All of these minimize the possibility of such damage to persons and property"); S. Rep. No. 1605, *supra*, at 6 ("[i]t is generally recognized that the possibility of a catastrophic nuclear incident is extremely remote because of * * * the safety requirements imposed by the AEC").

[34] Appellant lays great stress (Br. 36-38) on the only reference to punitive damages in the entire legislative history of the Price-Anderson Act—a one-page discussion in a law review article attached as Appendix 39 to the *1965 Hearings*, *supra*, at 415-416. In that article, Professor David F. Cavers argued that "[w]ith two principal exceptions, the advantage of having uniform rules of damages for nuclear incidents throughout the nation does not seem great." Cavers, *Improving Financial Protection of the Public Against the Hazards of Nuclear Power*, 77 Harv. L. Rev. 644, 662 (1964) (*"Cavers"*). One of Cavers's "principal exceptions" was punitive

federal amendments designed to guarantee strict liability in the case of an extraordinary nuclear occurrence, it could safely rely on remedies provided by state common law to assure compensation. S. Rep. No. 1605, *supra*, at 9-10; 42 U.S.C. 2210(n).

To acknowledge that Congress relied on state remedies to provide compensation, however, is not to say that Congress left in place the entire corpus of state common law.[35] Congress surely did not intend, for example, that a state court should entertain an action for nuisance to enjoin the operation of a nuclear power plant because the court believed it was unsafe. Cf. *Garner* v. *Teamsters*, 346 U.S. 485, 488-491 (1953). Nor did it suppose that a state could enjoin as a trespass the release of effluents from a

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damages. He argued that to pay them out of insurance or government funds would eat into the compensation fund provided by the Price-Anderson Act. On the other hand, to permit such awards and refuse to pay them out of insurance would open "a serious gap * * * in the financial protection" the Act was supposed to provide to operators (*id.* at 663).

Cavers's article was not discussed in his testimony at the 1965 Hearings (*1965 Hearings*, *supra*, at 211-223). And the failure to forbid punitive damage awards explicitly in the 1966 amendments may show nothing more than Congress's belief that punitive damages were already preempted by the 1954 Act, and inconsistent with the compensation scheme of the Price-Anderson Act.

[35] Nor does it mean that states were left free to award compensation against the operator of a nuclear facility in all cases where the states might deem it appropriate. For example, "to allow damages, even in a private action, for psychological nuisance would be in direct conflict with" the Atomic Energy Act. E. Stason, S. Estep, & W. Pierce, *Atoms and the Law* 352 (1959). The same may be true where the existence of harm itself is a matter of prediction, and the level of radiation is within limits that the NRC has concluded are safe. Cf. *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, Nos. 81-2399 and 82-358 (Apr. 19, 1983). But see *McKay* v. *United States*, 703 F.2d 464 (10th Cir. 1983).

plant in compliance with NRC regulations. 10 C.F.R. Part 20 app. B; cf. *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143 (8th Cir. 1971), aff'd, 405 U.S. 1035 (1972). And as the court of appeals in this case pointed out (J.S. App. 22a), the limitation on liability in the Price-Anderson Act (42 U.S.C. 2210(e)) "implicitly assumes that only compensatory damages will be awarded" in the event of an extraordinary nuclear occurrence.[36] Rather than preserve all state common law rules, what Congress did was to leave to the states a narrow area not governed by the Atomic Energy Act—the provision of compensation to protect discrete private interests harmed by the operations of federal licensees and contractors. By contrast, the imposition of sanctions for unsafe operations—and the concomitant regulation of future licensee conduct in the public interest—was specifically addressed in the Act and so withdrawn from the states.

3. Appellant nonetheless argues that because the Price-Anderson Act envisions awards of compensatory damages under state law, it necessarily signals congressional approval of punitive damages as well. That is so, he asserts (Br. 42-45), because compensatory damages are themselves a form of regulation, and punitive damages do not address any practices not already regulated by compensatory damages. Appellant also contends (Br. 45-49) that the state interest in policing malicious or reckless conduct is one " 'deeply rooted in local feeling and responsibility[,]' " and it is thus unlikely that Congress intended to displace it in favor of federal regulation.

Appellant's first argument simply ignores what this Court only recently made clear:

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[36] To suggest that Congress authorized punitive damages for harms of lesser magnitude is to ascribe to it a somewhat perverse intent.

the federal government has occupied the entire field of nuclear safety concerns, except the limited powers *expressly* ceded to the states.[25]

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[25] In addition to the opportunity to enter into agreements with the NRC under § 274(c), Congress has specifically authorized the states to regulate radioactive air pollutants from nuclear plants, Clean Air Act Amendments of 1977, § 122, 42 U.S.C. § 7422 (Supp. III 1979), and to impose certain siting and land use requirements for nuclear plants, NRC Authorization Act for Fiscal Year 1980, Pub. L. 96-295, 94 Stat. 780 (1980).

Pacific Gas & Electric Co., supra, slip op. 19-20 & n.25 (emphasis added). As the language ("expressly") and the examples demonstrate, state authority to regulate either by statute or by common law in this area is not to be found by inference. It is conferred by Congress only in explicit statutory language. With regard to compensatory damages the Price-Anderson Act—whose very purpose was to assure compensation under state law—satisfies that requirement. On the other hand there is, in the language and the history of the Atomic Energy and Price-Anderson Acts, no indication whatever that Congress intended to allow awards of punitive damages for licensee conduct found by a jury to endanger the public safety.

Appellant also errs in suggesting that punitive damages do not regulate any practices not already controlled by compensatory damages.[27] It may be that the *occasion* for punitive damages is also one calling for a compensatory award. But the very purpose of punitive damages is to fine the defendant in order to control his *future conduct*

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[27] This case affords a vivid illustration of the staggering differences that may occur between "regulating" through compensation and "regulating" through punitive damages. Because the court of appeals held that compensation for personal injury to Silkwood could only be awarded under the Oklahoma workers' compensation law, the award of $10 million in punitive damages—if reinstated—would be appended to a $5000 verdict for property damages.

in a way that payment of compensation will not. Cf. *Electrical Workers* v. *Foust*, 442 U.S. 42, 50-52 (1979).

Nor should it be thought curious that Congress displaced punitive damages with civil (42 U.S.C. (Supp. V) 2282(a)) and criminal (42 U.S.C. (& Supp. V) 2272-2278b, 2283-2284) penalties, but left compensatory awards to state law.[38] Having contemplated that licensees could be required to insure the public against the costs of even unavoidable accidents—*i.e.*, be strictly liable for compensating any harm caused[39]—Congress doubtless saw little benefit in requiring that the funds be distributed through federal hands.[40] The assessment of

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[38] Appellant argues that "[i]f a corporate board of directors acted to rid itself of a particularly annoying critic of nuclear power by mixing plutonium from the plant into food served that critic, it could hardly be contended that a state court, by awarding punitive damages, was doing so for the 'purpose' of 'protection against radiation hazards' in the sense Congress intended by those words" (Br. 48). The short answer to appellant's example is that a state could no more award punitive damages against *the licensee* in that case than it could revoke its license. The state could, of course, prosecute the directors for murder, just as it could award compensation to the victim's heirs. The NRC performs neither of those functions, and prosecution of the individuals involved would neither "put[the] licensee out of business" nor "adversely affect[its] ability to safely conduct licensed activities." 47 Fed. Reg. 9991 (1982); *Cavers*, *supra*, 77 Harv. L. Rev. at 664 ("recovery of punitive damages should be denied in all nuclear cases, except perhaps a case against a wrongdoing individual, who, as to these damages, should not be protected by the operator's insurance or indemnity"). The NRC could also impose sanctions on the licensee to ensure its cooperation in preventing the recurrence of such an incident. Cf. *In re Atlantic Research Corp.*, *supra*.

[39] See *Cavers*, *supra*, 77 Harv. L. Rev. at 667-668.

[40] States are of course left free to restrict the collection of compensation by not taking up the option to impose strict liability (at least in the case of incidents falling short of an extraordinary nuclear occurrence). By doing so they frustrate neither of the two primary objectives pursued by Congress in the Atomic Energy Act: promoting the availability of commercial nuclear power at competitive prices (see note 27, *supra*), and protecting the public

penalties, by contrast, requires an assessment of past and future licensee conduct (including licensee safety precautions); how it has departed from federal standards; what sanctions will promote (rather than impede) safe operations; and so on.[41] Congress accordingly left those issues to the uniform and expert judgment of the Commission.

It is true, as appellant states (Br. 43), that requiring licensees to pay the external costs of their operations will encourage them to avoid such costs, and so in a sense compensatory damages may be seen as a type of state "regulation" of nuclear power. But there is no way to split that effect from its cause. And the fact that Congress was willing to accept the "regulation" inherent in leaving the states some freedom to determine how to distribute the costs of accidents, does not in the least suggest that it must also have authorized the states to revoke operators' licenses, or to impose fines that might have the same effect, because of what the states may deem unsafe practices. The ultimate "regulatory" effect of compensation is simply to require that nuclear energy be truly efficient—*i.e.*, that it cover all its costs, including the cost of accidents. The Atomic Energy Act demands more of the nuclear industry: that it be safe as well as efficient. But, with a few express exceptions, Congress left to the NRC "the entire field of nuclear safety con-

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health and safety against the hazards of radiation. See 42 U.S.C. 2011-2012.

[41] For example, in deciding what penalty to impose for willful violations, the NRC considers the intent of the violator (*e.g.*, recklessness rather than deliberateness), the position of the person involved in the violation (*e.g.*, first line supervisor or senior manager), the significance of the underlying violation, the economic advantage gained by the violation, and so on. 47 Fed. Reg. 9990 (1982). The Commission then imposes sanctions of five different severity levels for seven different activity areas, and adjusts base penalties to take account of such matters as prompt identification and reporting, corrective action, enforcement history, etc. (*id.* at 9990-9995).

cerns * * *." *Pacific Gas & Electric Co., supra*, slip op. 19.[42]

CONCLUSION

Should the Court conclude that it has jurisdiction of the appeal, the judgment of the court of appeals should be affirmed. Alternatively, the appeal should be dismissed and the papers treated as a petition for a writ of certiorari, and the petition should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

PAUL M. BATOR
Deputy Solicitor General

JOHN H. GARVEY
Assistant to the Solicitor General

JUNE 1983

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[42] Appellant's contention that the preemption of punitive damages violates due process (Br. 49-50 n.48) is frivolous. As this Court recognized in *Duke Power Co., supra*, 438 U.S. at 84, the only question regarding such claims is whether Congress's decision to preclude punitive damages "is demonstrably arbitrary or irrational." It clearly is not. Congress merely substituted for one means of controlling licensees' conduct (a means subject to the whims of a jury), another method implemented by the NRC. Plaintiffs who are the incidental beneficiaries of juries' discretionary punitive awards have no right under Oklahoma law to exemplary damages, see *Amoco Pipeline Co.* v. *Montgomery*, 487 F. Supp. 1268, 1272 (W.D. Okla. 1980), even in order to pay the expenses of litigation. *Cox* v. *Theus*, 569 P.2d 447, 450 (Okla. 1977). They may still receive compensation for harmful licensee misconduct, either under workers' compensation or, in a proper case, in the form of compensatory damages (J.S. App. 3a-21a).

Appellant apparently no longer contends, as he did in his jurisdictional statement (J.S. 24-29), that Congress violated the equal protection component of the Fifth Amendment when it preempted punitive damages.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 409482 15

No. 81-2159-AFX
Status: GRANTED

Title: Bill M. Silkwood, Administrator of the Estate of Karen G. Silkwood, Deceased, Appellant
v.
Kerr-McGee Corporation, etc., et al.

Docketed:
May 20, 1982

Court: United States Court of Appeals for the Tenth Circuit

Counsel for appellant: Angel,Arthur R.

Counsel for appellee: Paul,William G., Solicitor General

Entry	Date	Note	Proceedings and Orders
1	May 20 1982	G	Statement as to jurisdiction filed.
2	May 20 1982		Brief amicus curiae of State of Minnesota filed.
3	Jun 3 1982		Application for leave to file amici curiae brief in excess of page limitations, and order granting same by
4	Jun 3 1982		White, J., 6/4/82, not to exceed 57 pages.
6	Jun 7 1982		Order extending time to file response to jurisdictional statement until July 19, 1982.
7	Jul 17 1982		Brief amicus curiae of State of New York, et al. filed.
8	Jul 21 1982		DISTRIBUTED. September 27, 1982
9	Jul 22 1982	X	Motion of appellee Kerr-McGee Corp, et al. to dismiss or affirm filed.
10	Sep 16 1982	X	Reply brief of appellant Silkwood, Admin. filed.
11	Oct 4 1982	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
12	Nov 30 1982		Brief amicus curiae of United States filed.
13	Dec 8 1982		DISTRIBUTED. January 7, 1983
14	Jan 3 1983	X	Reply brief of appellant Silkwood, Admin. filed.
16	Jan 5 1983	G	Motion of Wisconsin, et al. for leave to file a brief as amici curiae filed.
18	Jan 10 1983		Motion of Wisconsin, et al. for leave to file a brief as amici curiae GRANTED.
19	Jan 10 1983		Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits.
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20	Feb 9 1983		DISTRIBUTED. February 25, 1983. (Motion of parties to dispense with printing the joint appendix).
22	Feb 16 1983		Order extending time to file brief of appellant on the merits until March 28, 1983.
23	Feb 19 1983		Brief amicus curiae of State of Minnesota filed.
24	Feb 7 1983	G	Motion of the parties to dispense with printing the joint appendix filed.
26	Feb 28 1983		Motion of the parties to dispense with printing the joint appendix GRANTED.
27	Mar 8 1983		Order further extending time to file brief of appellant on the merits until April 27, 1983.
28	Mar 18 1983		Record filed.
29	Mar 18 1983		Certified original record & C.A. proceedings, 9 boxes received.
30	Apr 25 1983		Brief amicus curiae of State of New York, et al. filed.

No. 81-2159-AFX

Entry	Date	Note	Proceedings and Orders
31	Apr 27 1983	G	Motion of National Women's Health Network for leave to file a brief as amicus curiae filed.
32	Apr 27 1983		Brief of appellant Silkwood, Admin. filed.
33	Apr 29 1983	G	Motion of New Jersey Department of Public Advocate for leave to file a brief as amicus curiae filed.
34	May 16 1983		Motion of National Women's Health Network for leave to file a brief as amicus curiae GRANTED.
35	May 16 1983		Motion of New Jersey Department of Public Advocate for leave to file a brief as amicus curiae GRANTED.
37	May 12 1983		Order extending time to file brief of appellee on the merits until June 27, 1983.
38	May 12 1983	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
39	May 31 1983		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
40	Jun 14 1983		Application for leave to exceed page limits on amicus brief of United States filed with BRW (A-1003).
41	Jun 15 1983		Order granting same not to exceed 40 pages by White, J.
42	Jun 25 1983		Brief amicus curiae of United States filed.
43	Jun 29 1983		Brief of appellee Kerr-McGee Corp, et al. filed.
44	Jun 27 1983		Brief amicus curiae of Atomic Industrial Forum, Inc. filed.
45	Aug 4 1983		CIRCULATED.
46	Aug 15 1983		SET FOR ARGUMENT. Tuesday, October 4, 1983. (2nd case)
47	Sep 27 1983	X	Reply brief of appellant Silkwood, Admin. filed.
48	Oct 4 1983		ARGUED.